Supreme Court, U.S.
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No. 05-1034

In The
Supreme Court of the United States

MICHAEL CARUSO,

Petitioner,

v.

YAMHILL COUNTY, an Oregon municipal corporation, by and through its COUNTY COMMISSION, and STATE OF OREGON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF LEGAL QUESTIONS PRESENTED ON REVIEW

O.R.S. § 280.070(4) requires that every ballot measure in Oregon proposing any property tax change include a warning on the ballot itself, stating "This measure may cause property taxes to increase more than three percent." This same warning is required on every such ballot, adjacent to the YES/NO choices for voters, regardless of the size of actual proposed change. Plaintiff refers to this as "the 3% warning".

These questions are presented:

1. Does O.R.S. § 280.070(4) violate the First Amendment rights of ballot measure sponsors or petitioners to communicate on the subject of a ballot measure presented to voters?

2. Should strict scrutiny apply when:

   A. The State mandates that the "yes" and "no" choices on a ballot measure be accompanied by a slogan found by the U.S. District Court to be "patently false" and "profoundly misleading" as applied to that ballot measure?

   B. The State allows no judicial review of the mandatory slogan for accuracy or fairness, as applied to any ballot measure?

3. If strict scrutiny applies, did the State of Oregon justify application of the 3% warning by demonstrating that it was narrowly tailored to achieve a compelling or overwhelming state interest?

4. If strict scrutiny does not apply, did the State justify application of the 3% warning by demonstrating that it was a reasonable and nondiscriminatory regulation necessary to achieve an important state interest?

STATEMENT OF LEGAL QUESTIONS PRESENTED ON REVIEW – Continued

5. Does the mandatory appearance of the 3% warning on the ballot, whether or not it is true:

   A. Impair the First Amendment rights of petitioners to be free of coerced, false speech on a public issue?

   B. Impair the Fifth and Fourteenth Amendment rights of petitioners and voters to due process and fundamental fairness in elections?

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption. Petitioner for Certiorari is an individual only and not a corporation.

TABLE OF CONTENTS

	Page
CITATIONS TO REPORTS OF OPINIONS	1
BASIS FOR JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE	1
A. CONSTITUTIONAL PROVISIONS	1
B. STATUTES	2
STATEMENT OF FACTS	2
ARGUMENT FOR ALLOWANCE OF THE WRIT	7
I. THE COURT OF APPEALS OPINION DISREGARDS THE STANDARD OF CONSTITUTIONAL SCRUTINY ABSOLUTELY REQUIRED BY *COOK V. GRALIKE*	14
A. STRICT SCRUTINY APPLIES TO STATE-MANDATED BALLOT SLOGANS OR TAGLINES	14
B. STRICT SCRUTINY APPLIES WITH EVEN GREATER FORCE TO STATE-MANDATED SLOGANS OR TAGLINES ATTACHED TO CITIZEN INITIATIVES	19
II. THE COURT OF APPEALS OPINION SUBSTITUTES SPECULATION ABOUT WHAT HYPOTHETICAL SOPHISTICATED VOTERS MIGHT KNOW IN PLACE OF THE TRIAL COURT'S FINDINGS OF FACT	23
A. THE COURT OF APPEALS OPINION HYPOTHESIZES THAT OREGON VOTERS CAN CONCEIVABLY UNDERSTAND THE 3% WARNING, BASED UPON ITS MISCONCEPTIONS OF OREGON LAW ON PROPERTY TAXES	24

TABLE OF CONTENTS – Continued

Page

B. THE COURT OF APPEALS OPINION REQUIRES VOTERS TO HAVE EXTENSIVE HISTORICAL KNOWLEDGE AND TO SPONTANEOUSLY DISBELIEVE THE OFFICIAL 3% WARNING 28

III. THE COURT OF APPEALS OPINION REVERSES THE DISTRICT COURT DECISION FOR PLAINTIFF ON HIS FOURTEENTH AMENDMENT CLAIMS ONLY BY DISREGARDING THE TRIAL COURT'S FINDINGS OF FACT 29

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Martin, 375 U.S. 399, 84 S.Ct. 454, 11 L.Ed.2d 430 (1964) 8, 17

Ark. Educ. Television v. Forbes, 523 U.S. 666, 118 S.Ct. 1633, 140 L.Ed.2d 875 (1998) 15

Buckley v. American Constitutional Law Found., 525 U.S. 182, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999) 5, 13, 14, 20, 22

Caruso v. Yamhill County ex rel. County Commissioner, 422 F.3d 848 (2005) ..... *passim*

Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 102 S.Ct. 434, 70 L.Ed.2d 492 (1981) 21

Cook v. Gralike, 531 U.S. 510, 121 S.Ct. 1029, 149 L.Ed.2d 44 (2001) ..... *passim*

Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985) 15

First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) 21

Gralike v. Cook, 191 F.3d 911 (8th Cir. 1999), *aff'd on other grounds*, *Cook v. Gralike*, 531 U.S. 510, 121 S.Ct. 1029, 149 L.Ed.2d 44 (2001) 9, 13

Horton v. Multnomah County, District of Oregon Case No. CV 03 1257ST (2003) 2, 3, 6

Horton v. Multnomah County, Multnomah County Circuit Court No. 0308-08431 (2003) 14

Lakeside v. Oregon, 435 U.S. 333, 98 S.Ct. 1091, 55 L.Ed.2d 319 (1978) 18

TABLE OF AUTHORITIES – Continued

Page

Lovell ex rel. Lovell v. Poway Unified Sch. Dist., 90 F.3d 367 (9th Cir. 1996) 23

Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 97 S.Ct. 421, 50 L.Ed.2d 376 (1976) 15

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995) 13

McLaughlin v. N.C. Bd. of Elections, 65 F.3d 1215 (4th Cir. 1995) 22

Meade v. Cedarapids, Inc., 164 F.3d 1218 (9th Cir. 1999) 23

Meyer v. Grant, 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988) 4, 13, 20, 22

National Audubon Society v. Davis, 307 F.3d 835 (9th Cir. 2002) 29

Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) 21

Oregonians for Accountability v. Bradbury, 2004 WL 1969405 (D. Or. 2004) 29, 30

Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983) 15

Provenz v. Miller, 102 F.3d 1478 (9th Cir. 1996) 23

R.A.V. v. St. Paul, 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992) 18

R.J. Reynolds Tobacco Co. v. Bonta, 272 F.Supp.2d 1085 (E.D. Cal. 2003) 13

R.J. Reynolds Tobacco Company v. Shrewey, 423 F.3d 906 (9th Cir. 2005) 13

TABLE OF AUTHORITIES – Continued

Page

Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) 22

Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) 15

Rubin v. City of Santa Monica, 308 F.3d 1008 (9th Cir. 2002) 12

Schacht v. United States, 398 U.S. 58, 90 S.Ct. 1555, 26 L.Ed.2d 44 (1970) 18

Smiley v. Holm, 285 U.S. 355, 52 S.Ct. 397, 52 S.Ct. 397, 76 L.Ed. 795 (1932) 16

State v. White, 303 Or. 333, 736 P.2d 552 (1987) 18

Storer v. Brown, 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974) 16

Timmons v. Twin Cities Area New Party, 520 U.S. 351, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997) 12, 17

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995) 8, 16

Vieth v. Jubelirer, 541 U.S. 276, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) 16

Warner Cable Communications, Inc. v. City of Niceville, 911 F.2d 634 (11th Cir. 1990) 13, 19

CONSTITUTIONS AND STATUTES

U.S. Constitution, First Amendment ..... *passim*

U.S. Constitution, Fifth Amendment 1, 6

U.S. Constitution, Fourteenth Amendment 1, 6, 29

28 U.S.C. § 1254 1

TABLE OF AUTHORITIES – Continued

Page

Oregon Constitution, Article IV, § 1(2)(d) 27

Oregon Constitution, Article XI, § 11(1)(b) 25

Oregon Constitution, Article XI, § 12 27

O.R.S. § 250.195 ..... 2, 14

O.R.S. § 280.070(4) ..... i, 2, 3, 5, 18

MISCELLANEOUS

BLACK'S LAW DICTIONARY (7th ed. 1999) 27

D. Schnieder and D. Wegner, *Don't Think of a White Bear*, JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY (1987) 18

CITATIONS TO REPORTS OF OPINIONS

The decision of the Ninth Circuit Court of Appeals is *Caruso v. Yamhill County ex rel. County Commissioner*, 422 F.3d 848 (2005) (No. 04-35155).

BASIS FOR JURISDICTION

This Court has jurisdiction to hear this Writ of Certiorari under 28 U.S.C. § 1254. The Oregon statute requiring that every ballot measure proposing any change to property taxes be labeled, on the ballot itself, with the legend "This measure may cause property taxes to increase more than three percent," regardless of the actual proposed change, as applied and interpreted by a final judgment of the Ninth Circuit Court of Appeals, is repugnant to First, Fifth, and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES, INVOLVED IN THE CASE

A. CONSTITUTIONAL PROVISIONS.

Plaintiff was deprived of his rights under the First and Fifth Amendments of the U.S. Constitution, made applicable to the states by the Fourteenth Amendment.

> Article I.
>
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
>
> Article V.
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in

> the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

B. STATUTES.

O.R.S. § 280.070 and O.R.S. § 250.195 are set forth in the Appendix.

STATEMENT OF FACTS

The procedural history is at *Caruso v. Yamhill County ex rel. County Commissioner*, 422 F.3d 848, 851-52 (2005). The underlying facts are well presented in the District Court Opinion and Order of January 14, 2004, App. 29-42 [hereinafter "District Court Opinion – Caruso"]. Because the circumstances of this case were nearly identical to those in an earlier case, *Horton v. Multnomah County*, District of Oregon Case No. CV 03 1257ST, the District Court Opinion – Caruso expressly incorporated the Opinion and Order in *Horton* (set out at App. 43-66).

Michael Caruso, Petitioner herein, was the Chief Petitioner on a petition placing the question of formation of a People's Utility District (PUD) on the county ballot. Oregon law requires that the question of a tax levy for the proposed PUD must also be presented at the same election. Therefore, the Yamhill County Commission adopted a ballot title for the levy question which began:

> **BALLOT TITLE MEASURE NO. 36-55**
>
> **CAPTION:**
>
> AUTHORIZES SPECIAL LEVY IF YAMHILL COUNTY PUD IS FORMED

QUESTION:

Shall voters authorize levy of $0.003 per $1,000 of assessed valuation if Yamhill County People's Utility District is formed? YES NO

This measure may cause property taxes to increase more than three percent.

The last sentence (the "3% warning") is required by O.R.S. § 280.070(4) to appear on all local property tax levy elections **verbatim**.

Caruso contended that, as applied to the PUD creation measure he and others had qualified for the Yamhill County ballot, the 3% warning mandated by O.R.S. § 280.070(4) was false, misleading to voters, and highly destructive to the prospects for passage of the measure by voters. It would tell voters that "This measure may cause property taxes to increase more than three percent," when in fact the property tax increase proposed was 1/10,000 of 3 percent. Thus, the 3% warning was false, by a factor of 10,000, and appears on ballots well above and far more prominently than any accurate explanation of the size of the levy in the later "Summary."

The District Court found this about the 3% warning:

(1) "Regardless of whether the three percent warning overstates the potential tax consequences of Measure 36-55 by a factor of 150 or 10,000, plaintiff contends correctly that such language is inherently misleading and hinders the conveyance of accurate information to voters." App. 32.

(2) "As noted above, the court adopts the reasoning set forth in *Horton* and finds that the three percent warning constitutes false and misleading language in the context of Measure 36-55." App. 33.

(3) "For the reasons provided in *Horton*, the court finds that the three percent warning

misleads voters to grossly overestimate the tax consequences of the ballot measure to which the warning attaches. The inclusion of the three percent warning in the title of Measure 36-55 will inevitably cause voter confusion and inhibit 'the type of interactive communication concerning political change that is appropriately described as "core political speech."' *Meyer*, 486 U.S. at 420-21." App. 36.

The District Court also found these facts:

1. "Plaintiff's ability to accurately explain the tax consequences associated with Measure 36-55 to voters is impaired by state-mandated language that is profoundly misleading. By placing the 'warning' on the ballot itself – a place where voters are likely to give great weight to the government-authored statement – defendants would eliminate any chance for plaintiff to rebut or clarify the issue to voters." App. 37.
2. "By placing the false and misleading three percent warning on the title of Measure 36-55, the State of Oregon has 'impede[d] the sponsors' opportunity to disseminate their views to the public.'" App. 37.
3. "Plaintiff's speech, as well as the speech of future ballot measure proponents, is chilled when the three percent warning is included in the title of a ballot measure that has no chance of 'causing' property taxes to increase more than three percent. Other circulators are less likely to obtain signatures for future ballot initiatives involving local option taxes and to engage in the political discourse accompanying that activity because they would face the hurdle of convincing voters of the false nature of the state-mandated

> 'warning.' Consequently, O.R.S. § 280.070(4) 'discourages participation in the petition circulation process. . . .' *Buckley*, 525 U.S. at 200." App. 38-39.

In the incorporated *Horton* opinion, the District Court concluded:

> Fundamental fairness in elections – a bedrock of our democracy – would be eroded if the state were allowed to require patently false "warnings" to appear on ballot measure titles.

App. 54-55.

Thus, the District Court found that the 3% warning was "patently false" and "profoundly misleading," based upon the evidence. The only testimonial evidence in the record was the uncontested Declaration of Michael Caruso (Excerpts of Record to Court of Appeals, ER 14-18). The State offered no testimony and did not challenge on appeal any of the District Court's findings of fact as clearly erroneous.

The District Court was able to assess the factual effect of the 3% warning on public debate about a PUD measure, even though the 3% warning did not actually appear on the ballot in Yamhill County at the March 2004 election. In November 2003, one month prior to filing of the *Caruso* complaint, there was a similar PUD election in the adjacent Multnomah County, which includes Oregon's largest city, Portland. On October 17, 2003, the same Chief Judge who ruled in *Caruso* found the same 3% warning to be in violation of the rights of petitioners and voters in Multnomah County, but county officials rushed the printing and mailing of the ballots so that the 3% warning nevertheless appeared on essentially all of the 345,000 ballots in Multnomah County on the same day that the District

Court ruled the 3% warning to be unconstitutional.[1] *Horton*, App. 56-57. Opponents of the measure then placed full-page advertisements in the major (and minor) newspapers, using the "official" 3% warning statement as the centerpiece argument against the measure. Declaration of Michael Caruso, Appellant's Excerpt of Record to Court of Appeals, pp. 16-17 [hereinafter E.R.]. Thus, the Chief Judge was well able to evaluate the credibility of Caruso's testimony that the 3% warning would (1) mislead voters "at the most crucial time in exercising their rights to vote" and (2) discourage "the efforts of petitioners in the other counties to collect the necessary signatures," because of "this gigantic, unfair barrier to the enactment of the measure by voters." *Id.*, E.R. 17-18.[2]

The District Court ruled that placing the 3% warning on the ballot violated Plaintiff's rights under the First, Fifth, and Fourteenth Amendments and that the statute requiring that the 3% warning be placed on all ballot measures proposing "local option taxes" was overbroad. The District Court issued an injunction which incorporated a limiting construction of the statute, allowing the State to place the 3% warning only on ballots where it would be true – where the measure itself would "cause property taxes to increase more than three percent." App. 41.

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[1] All elections in Oregon are conducted by mail only. There are no precinct polling places. All ballots in all elections are mailed to all registered voters, who return their completed ballots by mail or physical delivery to a county elections office or drop-off box.

[2] It took PUD supporters in Yamhill County over 6 months to collect the necessary valid voter signatures. Caruso and others collected the needed signatures in Yamhill County prior to the action by Multnomah County to place the 3% warning on the November 2003 ballot there.

ARGUMENT FOR ALLOWANCE OF THE WRIT

Allowance of the writ is warranted under Supreme Court Rule 10(c), as the Court of Appeals has decided important federal constitutional questions in a way that conflicts with relevant decisions of this Court and involves an important question of federal law that should be settled by this Court.

We are aware of no case allowing a government to mandate the placement of a slogan (or "tagline"), directly upon an initiative or referendum ballot (within a fraction of an inch of the boxes the "YES" and "NO") when:

1. There is no mechanism under state law for judicial review of the accuracy or fairness of the state-mandated slogan.
2. The U.S. District Court trier of fact has found that the mandatory slogan is "patently false" and "profoundly misleading" to voters and "discourages participation in the petition circulation process."

If the government is free to put slogans directly on ballots, whether or not they are false and/or misleading, then democracy in the United States is in serious trouble. The Court of Appeals allows the State to dictate election outcomes by placing on the ballot, immediately adjacent to where the voter marks "yes" or "no", a severely prejudicial slogan that the Chief Judge of the U.S. District Court found to be "patently false" and "profoundly misleading," on the basis of the evidence presented.

This Court in *Cook v. Gralike*, 531 U.S. 510, 121 S.Ct. 1029, 149 L.Ed.2d 44 (2001), ruled that the State cannot mandate the appearance of a pejorative slogan ("disregarded voters' instruction on term limits") on ballots next

to the names of candidates.[3] Now, the Court needs to address the appearance of a state-mandated false and misleading slogan next to the "yes" and "no" boxes for ballot measures. Allowing such slogans on ballots sows the seed for complete destruction of the initiative process, which enables voters in 24 states to enact legislation, independent of officeholders.

Here, it was the officeholders in the Oregon Legislature that adopted the statute that mandates the appearance of the 3% warning, regardless of the truth. The Court of Appeals decision here would allow any legislature to destroy the initiative process by requiring that measures presented to voters carry with them wildly inaccurate slogans.

Further, if the Legislature can mandate such taglines, then so can the people using the initiative process. The initiative process could well devolve into a battle of mandatory ballot slogans, with the advocates of each position on any issue seeking to enact laws to place their favored

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[3] Indeed, it seems clear that the adverse labels handicap candidates "at the most crucial stage in the election process – the instant before the vote is cast." *Anderson v. Martin*, 375 U.S. 399, 402, 84 S.Ct. 454, 11 L.Ed.2d 430 (1964). At the same time, "by directing the citizen's attention to the single consideration" of the candidates' fidelity to term limits, the labels imply that the issue "is an important – perhaps paramount – consideration in the citizen's choice, which may decisively influence the citizen to cast his ballot" against candidates branded as unfaithful. *Ibid.* While the precise damage the labels may exact on candidates is disputed between the parties, the labels surely place their targets at a political disadvantage to unmarked candidates for congressional office. Thus, far from regulating the procedural mechanisms of elections, Article VIII attempts to "dictate electoral outcomes." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S., at 833-834, 115 S.Ct. 1842.

Cook v. Gralike, *supra*, 531 U.S. at 525-26.

slogans on all initiatives or referenda addressing their particular subjects of interest. "Failure to fund schools may cause your schools to collapse, teachers to be unqualified, and your children to fail in life" could become a popular slogan to mandate on every education-related levy.

The specific flaws in the Court of Appeals opinion include:

1. The Court of Appeals opinion employs a "balancing test" instead of the required "strict scrutiny" and misapprehends a material point of law: This is not a ballot access case. It is a public forum case involving a state-mandated ballot slogan or tagline, which requires strict scrutiny under *Cook v. Gralike*, 531 U.S. 510, 121 S.Ct. 1029, 149 L.Ed.2d 44 (2001).
2. The Court of Appeals opinion conflicts with *Gralike v. Cook*, 191 F.3d 911, 919-20 (8th Cir. 1999), *aff'd on other grounds*, *Cook v. Gralike*, 531 U.S. 510, 121 S.Ct. 1029, 149 L.Ed.2d 44 (2001), on application of the First Amendment to state-mandated ballot slogans or taglines.
3. The Court of Appeals opinion allows the State to severely impair, if not destroy, the ability of ballot measure petitioners and supporters to communicate with voters, by placing directly on the ballot, next to the "YES" and "NO" boxes, a slogan about the measure found by the District Court to be "patently false" and "profoundly misleading," on the basis of the evidence presented.
4. The Court of Appeals opinion disregards and contradicts the factual findings made, on the basis of evidence in the record, by the trier of fact (District Court), which found that the 3% warning was factually false and misleading to voters. The Court of Appeals also

failed to apply the correct standard of review of the District Court's factual findings, which is the "clear error" standard. The Court of Appeals did not indicate which, if any, of the District Court's findings of fact were clearly erroneous.

5. In rejecting plaintiff's due process claims, the Court of Appeals opinion countermanded the District Court's express finding that the 3% warning "would so mislead voters that they would be unable to decipher the subject of Measure 36-55," while itself offering an explanation of the 3% warning that depends upon mere speculation, with no evidence in the record, about the detailed historical knowledge about property taxes that some Oregon voters might have.

6. The Court of Appeals opinion itself reflects a misunderstanding of the Oregon system of property tax limitations that was not offered by any party in the case.

This case also involves questions of exceptional importance, governing how State or local governments can heavily influence the outcome of any and all ballot measure elections by mandating that false or misleading slogans appear on the ballot itself, as a part of the question to be voted upon. **Allowing governments to place false and/or misleading slogans directly upon the ballot is tantamount to allowing government itself to predetermine the outcome of these elections.**

If the Court of Appeals opinion stands, then legislators at all levels (including state and local voters through

the initiative process[4]) will be free to mandate false or misleading statements directly upon ballots, as part of the ballot questions, right next to the boxes for YES and NO, where the slogans will have very profound influence at "the most crucial stage in the election process," *Cook*, 531 U.S. at 252, and when the false statement cannot be refuted by additional communication.

The potential examples are endless. Proponents of school funding could enact a law that requires that all school tax levy ballot questions display, as part of the ballot question, a slogan such as that shown in bold (in place of the current "3% warning"):

> **BALLOT TITLE MEASURE NO. 00-00**
>
> **CAPTION:**
>
> AUTHORIZES SPECIAL LEVY FOR SCHOOL DISTRICT 1.
>
> **QUESTION:**
>
> Shall voters authorize 3-year levy of $0.003 per $1,000 of assessed valuation for school computer classrooms?
>
> **Failure of this measure may cause your schools to be inadequate and your children to fail in life.** YES NO

Proponents of mandatory criminal sentences could enact a measure requiring that all ballot questions pertaining to criminal sentencing display this warning: "Failure of this measure may allow judges to let murderers and rapists receive short sentences, putting them back on the streets."

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[4] Ballot measure proponents include sponsors of initiatives, referenda, and measures referred to the ballot by government bodies on the whole gamut of governmental activities, only one of which is property tax rate changes.

The Court of Appeals opinion would allow the mandated appearance of such partisan viewpoints on ballots. It does not require that the slogan be accurate or not misleading, only that it could conceivably be accurate in some situations or be understood by some sub-class of voters with very specialized knowledge of its "history" or special interest (such as property owners). *See* 422 F.3d at 859-61 (noting that it "could be read as accurate" by a voter with extensive knowledge or that there is "more than an 'infinitesimal possibility' that property taxes will increase three percent").

Thus, the Court of Appeals opinion opens the Pandora's Box that *Cook* orders closed. Also, the Court of Appeals opinion switches the roles of the Plaintiff-Appellee Caruso and the Intervenor-Appellant State of Oregon [hereinafter "State"] and expresses the incorrect belief that it was Caruso who wanted to put a slogan on the ballot.

> But the fact that the ballot is "crucial" to an election does not imply that Caruso therefore has a First Amendment right to communicate a specific message through it. To the contrary, the Supreme Court in *Timmons* rejected the "contention that [a political party] has a right to use the ballot itself to send a particularized message": "Ballots serve primarily to elect candidates, not as forums for political expression." 520 U.S. at 362-63, 117 S.Ct. 1364; *accord Rubin*, 308 F.3d at 1016 ("A ballot is a ballot, not a bumper sticker.").

422 F.3d at 856. **But that is the opposite of the true situation. It was the State that demanded to place the slogan on the ballot, not Caruso.** Caruso wanted the specific message (the 3% warning) to be removed, as it was "patently false" and "profoundly misleading," as the District Court concluded.

The Court of Appeals opinion encourages **more** slogans to burden ballots in Oregon, in contradiction to the teachings of *Gralike* and *Cook*, which struck down a government-mandated ballot tagline on candidates, and *R. J. Reynolds Tobacco Co. v. Shrewey*, 423 F.3d 906 (9th Cir. 2005), which concluded:

> [T]here are already several recognized instances of constitutional limitations on government speech and "government is no more free to disregard constitutional and other legal norms when it speaks than when it acts." *R.J. Reynolds Tobacco Co. v. Bonta*, 272 F.Supp.2d 1085, 1110 (E.D. Cal. 2003). For example, there may be instances in which the government speaks in such a way as to make private speech difficult or impossible, or to interfere with some other constitutional right, which could raise First Amendment concerns. *See Warner Cable Communications, Inc. v. City of Niceville*, 911 F.2d 634, 638 (11th Cir. 1990) ("[T]he government may not speak so loudly as to make it impossible for other speakers to be heard by their audience. The government would then be preventing the speakers' access to that audience, and first amendment concerns would arise.").

423 F.3d at 923. And *Reynolds* involved government speech that was not "patently false" or "profoundly misleading."

Further, this Court affords an even greater level of protection to communication pertaining to issues and ballot measures. *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995); *Meyer v. Grant*, 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988). Such communication from petitioners to voters is the most highly protected speech and where First Amendment

protection is "at its zenith." *Buckley*, 525 U.S. at 187. Impairment of those communications by the State must be narrowly tailored to achieve a critical state interest.

I. THE COURT OF APPEALS OPINION DISREGARDS THE STANDARD OF CONSTITUTIONAL SCRUTINY ABSOLUTELY REQUIRED BY *COOK V. GRALIKE*.

The Court of Appeals opinion errs by failing to apply strict scrutiny to the 3% warning slogan on the ballot. It faults Caruso for seeking the "right to communicate a specific message through [the ballot]," 422 F.3d at 856, when it was the State, not Caruso, that placed the pejorative message on the ballot, with no opportunity for judicial review in any Oregon court for accuracy or fairness.[5] The Court of Appeals applied only the "flexible balancing standard" applicable to candidate ballot access cases.

A. STRICT SCRUTINY APPLIES TO STATE-MANDATED BALLOT SLOGANS OR TAGLINES.

This is a viewpoint discrimination case. The State has converted the ballot into a "designated public forum" by

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[5] The Oregon ballot title process provides for judicial review of the accuracy of statements in the ballot title, except for the 3% warning, which is mandated by statute. On local measures, the final authority on whether a ballot title is "insufficient, not concise or unfair" is the trial court of the county, which provides the "first and final review." O.R.S. § 250.195. When others challenged the presence of the 3% warning on a PUD ballot measure in Multnomah County in 2003, the Multnomah County Circuit Court concluded that it was mandated by statute and not subject to judicial review as to its accuracy. *Horton v. Multnomah County*, Multnomah County Circuit Court No. 0308-08431.

singling out a slogan for the voter.[6] "Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set." *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 8290, 115 S.Ct. 2510, 2517 132 L.Ed.2d 700 (1995). The government may not pick and choose among slogans because it prefers its own "skewed" viewpoint.[7]

A state-sponsored slogan is not a "ballot regulation." The Court of Appeals opinion relies upon a number of cases which allow the state latitude in the **mechanics** of elections (how candidates qualify for the ballot for example, and the relationship between the voter and an intermediary, such as a political party). But the U.S. Supreme Court in *Cook* concluded that a government-mandated slogan or tagline on the ballot is ***not*** a "time, place, and manner" regulation that escapes strict scrutiny.[8]

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[6] *See Ark. Educ. Television v. Forbes*, 523 U.S. 666, 677, 118 S.Ct. 1633, 140 L.Ed.2d 875 (1998); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983).

[7] *Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 175, n. 8, 97 S.Ct. 421, 426, n. 8, 50 L.Ed.2d 376 (1976), illustrates that, while a forum may be limited, once created its limitations are subject to strict scrutiny.

[8] The Court of Appeals opinion offers a confusing description of *Cook*, implying that this Court rejected the First Amendment claim of the plaintiffs. That is not correct. In fact, the 8th Circuit found the tagline requirement contrary to the First Amendment. The U.S. Supreme Court majority opinion ruled it invalid under the Elections Clause. The majority rejected the First Amendment arguments **of the defendant** as not relevant to the Elections Clause but did not reach the First Amendment arguments **of the plaintiffs**, having decided the case on the Elections Clause. The concurring opinion of C.J. Rehnquist and J. O'Connor concluded that the tagline violated the First Amendment.

Seven sitting justices in *Cook* announced that placing slogans on the ballot is not a "time, place, and manner" restriction that avoids strict scrutiny.

> Article VIII [the Missouri term limits tagline requirement] is not a procedural regulation. It does not regulate the time of elections; it does not regulate the place of elections; nor, we believe, does it regulate the manner of elections. As to the last point, Article VIII bears no relation to the "manner" of elections as we understand it, for in our commonsense view that term encompasses matters like "notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns." *Smiley*, 285 U.S., at 366, 52 S.Ct. 397; *see also U.S. Term Limits, Inc. v. Thornton*, 514 U.S., at 833. In short, Article VIII is not among "the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved," *Smiley*, 285 U.S., at 366, 52 S.Ct. 397, ensuring that elections are "fair and honest," and that "some sort of order, rather than chaos, is to accompany the democratic process," *Storer v. Brown*, 415 U.S. 724, 730, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974).

531 U.S. at 523-24. This part of *Cook* (Part IV of the Opinion of the Court) was joined by six justices, and J. Kennedy also agreed in his concurrence that the tagline requirements "do not regulate the time or place of federal elections." 531 U.S. at 527. *Cook* requires that "every decision by the sovereign serve some nonpartisan public purpose" and not be used to "dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional constraints." *Vieth v. Jubelirer*, 541 U.S. 276, 333, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (Stevens, J., dissenting).

The Court of Appeals opinion concludes that the 3% warning "regulates only what is said through the ballot itself," 422 F.3d at 856, relying on *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997). That was a ballot access case – holding that the third party had other means to get on the ballot without "piggybacking" on another party's ballot line. Here, we are dealing with a state-mandated ballot slogan or tagline, which is direct speech to voters on a public issue and is governed by *Cook*.

Anderson v. Martin, 375 U.S. 399, 84 S.Ct. 454, 11 L.Ed.2d 430 (1964), held that a Louisiana statute requiring the designation of a candidate's race on the ballot unconstitutional. In describing the effect of such a designation, the Court said: "[B]y directing the citizen's attention to the single consideration of race or color, the State indicates that a candidate's race or color is an important – perhaps paramount – consideration in the citizen's choice, which may decisively influence the citizen to cast his ballot along racial lines." *Id.*, at 402, and handicap the fair process "at the most crucial stage in the election process – the instant before the vote is cast." *Anderson v. Martin*, 375 U.S. at 402.

Here, the 3% warning singles out the supposedly adverse effect of the measure on the voter's wallet. Not presented are the benefits to the voter's wallet from lower electricity rates resulting from public ownership or benefits of adequately-funded education, police protection, jails, or other public services funded by property tax levies.

The Court of Appeals opinion says that Measure 36-55 was not singled out, because the 3% warning applies to all local option levies. This misconceives the "singling out" test. In candidate cases, candidates are competing against each other, so one candidate cannot be singled out for prejudicial treatment. In ballot measures, the competitors are the "yes" and "no" sides. The 3% warning singles out the "yes" side for impairment, with a profoundly misleading

statement about how much the measure will cost taxpayers. There are no countervailing statements extolling the benefits of the measure, such as lower electric rates, more jails, etc. Even if there were, a true statement about the benefits cannot overcome a "patently false" and "profoundly misleading" statement about the cost of the measure to taxpayers. The fact that every tax levy is forced to suffer the same viewpoint discrimination does not save O.R.S. § 280.070(4).

This emphasis on one viewpoint illustrates why any government effort to restrict information to its own single viewpoint "requires particular scrutiny, in part because such regulation often indicates a legislative effort to skew public debate on an issue, *see, e.g., Schacht v. United States*, 398 U.S. 58, 63, 90 S.Ct. 1555, 1559, 26 L.Ed.2d 44 (1970)." *R.A.V. v. St. Paul,* 505 U.S. 377, 431, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992) (JJ. Stevens, White and Blackmun, concurring with plurality opinion by J. Scalia). The law recognizes that there a situations where more speech cannot "cure" a constitutional injury.[9]

This 3% warning on the ballot, adjacent to the "yes" and "no" choices, is the ultimate "bigger and better soapbox" which drowns out truthful speech:

> We agree that the government may not speak so loudly as to make it impossible for other speakers to be heard by their audience. The government would then be preventing the speakers'

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[9] The State's comment on the ballot may instill a lasting and prejudicial effect in the minds of reasonable people in the manner of the notorious, "do not think about a white bear" example, drawn from psychological research and noted in *State v. White*, 303 Or. 333, 342, 736 P.2d 552, 557 (1987), quoting *Lakeside v. Oregon*, 435 U.S. 333, 345, 98 S.Ct. 1091, 1098, 55 L.Ed.2d 319 (1978) (Stevens, J., dissenting). D. Schnieder and D. Wegner, *Don't Think of a White Bear*, JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY (1987).

> access to that audience, and First Amendment concerns would arise. For instance, if a city government builds a better soapbox, equipped with spotlights and powerful loudspeakers, next to the longstanding antique soapbox in the city square, and if government speakers dominate the new soapbox, then speakers on the first soapbox do not truly have the opportunity to communicate their views even to those who might wish to hear them. The city would indeed be "drowning out" the voice of the private speakers.

Warner Cable Communications, Inc. v. City of Niceville, 911 F.2d 634, 638 (11th Cir. 1990). Here, the Court of Appeals opinion asserts that the misleading 3% warning would stimulate further debate. In fact, as shown by the evidence deemed credible by the trial court, the false slogan actually allowed a further drowning out of any accurate message, because utilities used the publication of the sample ballot with the misleading 3% warning in huge media advertisements, thus amplifying the damage.

B. STRICT SCRUTINY APPLIES WITH EVEN GREATER FORCE TO STATE-MANDATED SLOGANS OR TAGLINES ATTACHED TO CITIZEN INITIATIVES.

The cases above show that this Court applies strict scrutiny when a State mandates that a candidate's name on the ballot have a certain slogan or tagline. This should apply with even greater force to state-mandated taglines on ballot measures, as this Court recognizes that such measures are where First Amendment protections are at their zenith.

The First Amendment of the U.S. Constitution protects the rights of petitioners using a state's initiative or referendum process to communicate with voters.

In *Buckley v. ACLF*, *supra*, the Court struck down a variety of statutes adopted by Colorado that inhibited the opportunity for petitioners to communicate with voters.

> Precedent guides our review. In *Meyer v. Grant*, 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988), we struck down Colorado's prohibition of payment for the circulation of ballot-initiative petitions. Petition circulation, we held, is "core political speech," because it involves "interactive communication concerning political change." *Id.*, at 422, 108 S.Ct. 1886 (internal quotation marks omitted). First Amendment protection for such interaction, we agreed, is "at its zenith." *Id.*, at 425, 108 S.Ct. 1886 (internal quotation marks omitted).

525 U.S. at 186-87.

In *Meyer v. Grant*, *supra*, the Court struck down state law prohibiting the use of paid signature gatherers because:

> It impedes the sponsors' opportunity to disseminate their views to the public. . . .
>
> Appellees seek by petition to achieve political change in Colorado; their right freely to engage in discussions concerning the need for that change is guarded by the First Amendment. . . .
>
> The circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change. . . . This will in almost every case involve an explanation of the nature of the proposal and why its advocates support it.

486 U.S. at 420-21 (footnotes omitted).

Thus, communication about ballot measures appears even more highly protected than communication about candidates. In candidate elections, the First Amendment

does not forbid the federal government or state governments from banning corporate or labor union campaign contributions or from limiting contributions made by individuals. *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000). But the Court has repeatedly held that the First Amendment protections do forbid such restrictions in ballot measure campaigns. *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 102 S.Ct. 434, 70 L.Ed.2d 492 (1981). So, if the state cannot mandate taglines for candidates on ballots, how can it possibly mandate taglines for ballot measures, particularly when the trier of fact has found that the tagline at issue is "patently false" and "profoundly misleading"?

Here, placing a false and misleading statement directly on the ballot which is used for voting cannot possibly be considered other than "core political speech" for which First Amendment protection is "at its zenith." **Statements about the effects of adopting a ballot measure, which appear directly on the ballot itself, constitute the most direct and credible possible means of communication with voters.** Requiring that the ballot itself convey false and misleading information to voters most severely impairs the First Amendment rights of petitioners to communicate with voters on the substance of the measure at issue.

The measure on the ballot was a presentation by petitioners, on behalf of themselves and the registered voters in Yamhill County who signed the petition for the Yamhill County People's Utility District (PUD) measure, to all of the registered voters within the boundaries of the proposed district. Forcing that presentation to include the false and misleading 3% warning is a most direct and severe infringement of the protected right of petitioners to communicate accurate information to voters. It is a far

greater infringement than those found to be in violation of the First Amendment in either *Buckley v. ACLF* or *Meyer v. Grant*.

The government cannot, under the First Amendment, force a false statement about a ballot measure upon the citizens who circulated the petitions containing the question and cannot force voters to read a false statement on the ballot. Being force-fed false statements by government itself, at the most intimate time in the exercise of democracy, dilutes the informed choice of voters. "And the right of suffrage can be denied by the debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims,* 377 U.S. 533, 555, 84 S.Ct. 1362, 1378, 12 L.Ed.2d 506 (1964).

In examining whether having a mandatory false statement on the ballot discourages future petition circulation, the Court of Appeals erred about the sequence of communication when it concluded that the 3% warning "leav[es] circulators free to contest its accuracy in their conversations with electors." App. 16. To the contrary, the vast bulk of voters will see the 3% warning only when they are actually voting, when the false statement cannot be refuted. This "handicap[s] them at the most crucial stage in the election process – the instant before the vote is cast." *Cook v. Gralike*, *supra*, 531 U.S. at 525. This makes the false 3% warning ballot slogan far worse than the Colorado requirement, struck down in *Buckley v. ACLF*, that circulators wear a badge stating "PAID" or "VOLUNTEER." The message conveyed by those badges was (1) true, not false or misleading; (2) not a substantive message about the ballot measure; and (3) not conveyed at the instant the vote is cast.

The Court of Appeals (App. 22) cites *McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1227 (4th Cir. 1995),

for a proposition about "a State's ballot language." But that case was not about ballot language at all. It was about language on **petitions**, not on ballots.

II. THE COURT OF APPEALS OPINION SUBSTITUTES SPECULATION ABOUT WHAT HYPOTHETICAL SOPHISTICATED VOTERS MIGHT KNOW IN PLACE OF THE TRIAL COURT'S FINDINGS OF FACT.

The State did not claim, and the Court of Appeals did not find, that any of the District Court's findings of fact were "clearly erroneous." Instead, the Court of Appeals opinion adopts its own, contrary findings of fact, including facts not even asserted by the State at any level.

The Court of Appeals opinion concludes that the 3% warning is not necessarily false and misleading to all potential voters. 422 F.3d at 859-61. But whether a statement is false or misleading to the "reasonable" person is an issue for the trier of fact, particularly where the District Court is striking down a state statute as contrary to the First Amendment. *Lovell ex rel. Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 370 (9th Cir. 1996). Whether a statement is misleading is a question of fact. *Meade v. Cedarapids, Inc.*, 164 F.3d 1218, 1221-22 (9th Cir. 1999). Also for the trier of fact is the assessment of the materiality of the statement to the conclusions likely to be drawn by its recipient. *Provenz v. Miller*, 102 F.3d 1478 (9th Cir. 1996).

The Court of Appeals fails to recognize that the testimony of a witness is evidence. It characterizes the statements of witness Caruso as being "unsupported by any evidence in the record." App. 15-16. But his sworn statements, accepted as factual and credible by the District Court, constituted the entirety of the testimony offered at the trial court. The Court of Appeals also states,

incorrectly, that "the material facts are not in dispute." App. 18. Whether the 3% warning is false, is misleading to voters, or has the effect of discouraging petition circulation are all questions of fact, which were in dispute and were resolved in favor of plaintiff at the District Court.

A. THE COURT OF APPEALS OPINION SPECULATES THAT OREGON VOTERS CAN CONCEIVABLY UNDERSTAND THE 3% WARNING, BASED UPON MISCONCEPTIONS OF OREGON LAW ON PROPERTY TAXES.

The Court of Appeals opinion's explanation of how one *could* hypothetically comprehend the 3% warning is lengthy and complex and assumes – without evidence in the record – that voters know the long history of property tax legislation in Oregon. Tellingly, the Court of Appeals opinion itself errs in its understanding of this history, even though it imputes such detailed and intricate knowledge to voters who could have been in grade school when the 3% limit on property value assessment annual increases was adopted, eight years before the election at issue here.[10]

The Court of Appeals opinion only speculates – with no basis in any record – that Oregon voters in 2004 in Yamhill County "were likely aware of the constitutional three-percent limit." The Court (App. 19-20) relies on the **assumed** content of voters' pamphlets and press coverage from 1996 or 1997, none of which is in the record or even referred to by judicial notice. It is merely assumed to exist.

The Court of Appeals opinion notes that property owners will be versed in this "history," thus allowing the

[10] The Court of Appeals opinion incorrectly refers to Measure 50 (1997) as the source of the 3% limit; the source was Measure 47 (1996).

words to have meaning for only propertied voters, not the "reasonable" voter.

The Court of Appeals approach is based on assuming vast knowledge by voters, including the Court's own misunderstandings about the Oregon Constitution, which limits **property valuation assessment increases**, not **property tax increases**, as incorrectly stated by the 3% warning.[11] Property valuation and tax rates are independent variables applied to any parcel of property. Regardless of property valuations (upon which there was zero evidence), tax rates can go up or down, as levies expire (for paid-off bonds, for example) and other levies are added. Oregon Constitution, Article XI, § 11(1)(b) states:

> For tax years beginning after July 1, 1997, the property's maximum assessed value shall not

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[11] The Court of Appeals discussion contains errors about Oregon's property tax system, not offered in the briefing of any party. It conflates limits applicable to increases in assessed value with limits on tax rates. For example, the Court of Appeals (App. 19) states:

> As discussed above, the Oregon Constitution provides that a "property's maximum assessed value shall not increase by more than three percent from the previous tax year." Or. Const. art. XI, § 11(1)(b). But this limitation may be exceeded by local option taxes submitted to and approved by voters in the taxing district. *Id.* § 11(4)(a)(A). When construed in context, then, the three-percent warning could be read as an accurate reminder that the local option tax proposed by Measure 36-55 would not be subject to the limitation imposed by the Oregon Constitution.

This is incorrect on many levels. The limitation on increases in maximum assessed value cannot "be exceeded by local option taxes submitted to and approved by voters in the taxing district." To the contrary, the limit on assessed values remains exactly the same. It is also not correct that "the local option tax proposed by Measure 36-55 would not be subject to the limitation imposed by the Oregon Constitution" (repeated also at App. 27). It would remain fully subject to that limitation, which applies to assessed valuations and not to tax rates.

> increase by more than three percent from the previous year.

This limitation in the Oregon Constitution does not apply to any increase in "property taxes" but instead applies only to any increase in "assessed value." Thus, the 3% warning is not remotely accurate, even if all voters are assumed to have perfect detailed knowledge of the Oregon property tax system. That assessed value increases are capped at 3% per year does not mean that property tax increases are capped at 3% per year, because taxing authorities can take steps to change their rates of taxation, either up or down. Accordingly, there is not even a factual foundation for the statement contained in the 3% warning, even if perfect knowledge for voters is assumed.

The Court of Appeals opinion requires that voters disregard the actual language of the 3% warning (which refers to "property taxes") and substitute their presumed sophisticated knowledge of the Oregon Constitution, which refers to increases in **assessed valuation** only. The Panel makes the same error in using the "common wisdom" (asserted in the State's Reply Brief only, but not a "fact" and never offered in the form of evidence) "that real market values, meanwhile, have been 'generally rising.'" There was absolutely no evidence on that subject in the record. This assumed lock-step relationship between assessed values and "property taxes" was not even asserted by the State, and it not true.

The District Court heard testimony and found the 3% warning to be "patently false" and "profoundly misleading." The Court of Appeals opinion disregards this finding and instead imposed on Caruso a variety of erroneous evidentiary burdens, such as proving that "real market values for some properties may be decreasing," 422 F.3d at 860, when that was never even an issue before the trial court.

In essence, the Court of Appeals concludes that, if property taxes happen to go up by 3% for some other reason, then indeed adding this incredibly small levy at issue could result in an overall increase of "more than three percent." But "could" means that there is only some infinitesimal possibility that the 3% warning is true. Under that standard, the State could present voters with an unlimited number of grossly misleading statements.

The 3% warning language states:

> "This measure may cause property taxes to increase more than three percent."

It refers to "cause." It is inherently misleading to attribute the **cause** of an event to a factor which comprises 1/10,000 of the **cause** (or perhaps 1/150 of the **cause**), while not even mentioning the factor which comprises the rest of the **cause** (property taxes increasing by 3% for some other reason, if in fact they are increasing for other reasons, upon which the State produced zero evidence).

As ballots are read and acted upon by voters, the term "cause" should be given its ordinary meaning. Definitions from ordinary dictionaries and legal dictionaries are similar and require that the "cause" be the agent "that produces an effect or result." BLACK'S LAW DICTIONARY (7th ed. 1999). "Legal cause" is defined as "proximate cause," which is "a cause that directly produces an event and without which the event would not have occurred." *Id.*

The Court of Appeals opinion also misapprehends the nature of Measure 36-55 itself. For example, it asserts that an initiative measure, by law, may "embrace one subject only." 422 F.3d at 857. The State made no such argument, as it is incorrect. PUD creation is not an "initiative" subject to Oregon Constitution, Article IV, § 1(2)(d), but a special process under Oregon Constitution, Article XI, Section 12, which pertains only to PUDs. Space limits here do not permit us to describe several other instances where

the Court of Appeals opinion relies on arguments and assertions of fact not offered by any party.

B. THE COURT OF APPEALS OPINION REQUIRES VOTERS TO HAVE EXTENSIVE HISTORICAL KNOWLEDGE AND TO SPONTANEOUSLY DISBELIEVE THE OFFICIAL 3% WARNING.

The Court of Appeals opinion says that the 3% warning could possibly be interpreted in a way that renders it sometimes true. Under that standard, the State could present voters with an unlimited number of grossly misleading statements that, with special detailed knowledge and references, some voters might be able to construe in a way that would make them true.

Here, the Court of Appeals approach would require each voter to disbelieve the official 3% warning and then do her own complicated calculations in order to come to the conclusion that the 3% warning is not correct. It would require each voter to take the following steps:

1. Read on the ballot, immediately under the question itself, that "This measure may cause property taxes to increase more than three percent";
2. Spontaneously choose not to believe that particular statement;
3. Plumb her memory for some ballot measure in 1996 that limited annual growth in property value assessments;
4. Conclude that the 3% warning must somehow refer to property value assessments and not with property taxes, even though it says nothing about value assessments;

5. Use the per dollar rate of the proposed tax ($0.003 per $1,000 of assessed valuation) to calculate a percentage increase in property taxes that is a factor of 10,000 different from the 3% stated on the ballot; and

6. Conclude that the 3% warning is wrong by a factor of 10,000, even though the warning appears with great prominence on the official ballot.

Instead, the trial court heard evidence and concluded that the voter would instead **believe** the 3% warning and be profoundly misled by it.

III. THE COURT OF APPEALS OPINION REVERSES THE DISTRICT COURT DECISION FOR PLAINTIFF ON HIS FOURTEENTH AMENDMENT CLAIMS ONLY BY DISREGARDING THE TRIAL COURT'S FINDINGS OF FACT.

The U.S. District Court ruled in favor of Caruso on his due process Fourteenth Amendment claims as well. The Court of Appeals opinion's reversal here depends upon its adoption of its own findings of fact, contrary to the trial court's, on whether the 3% warning was so misleading that it triggered the standard of *National Audubon Society v. Davis*, 307 F.3d 835, 858 (9th Cir. 2002).

Another District Court Judge in Oregon has commented on the extreme degree of misinformation in the 3% warning. *Oregonians for Accountability v. Bradbury*, 2004 WL 1969405 (D. Or. 2004) concluded that the explanatory statement prepared by various state officials for statewide Measure 38 (2004) was sufficient. Regarding the Due Process claim, the court concluded:

> The summary of the measure and the explanatory statement (not to mention the full text of the measure), which accompany the Estimate, make

> abundantly clear what Measure 38 will do. In contrast, I can see how the inclusion of the three percent warning **in the ballot title** in *Horton* and *Caruso* arguably "would so mislead voters that they would be unable to decipher the subject of the [measure]." *Caruso* at 12.

2004 WL 1969405, p. 5 (emphasis in original).

As the District Court noted, "Defendants conceded at the January 13, 2004, oral argument, 'This is a tough statute to uphold even under that test.'" App. 40.

Dated: February 3, 2006

Respectfully submitted,

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APPENDIX INDEX FOR PETITION FOR CERTIORARI

Page

Caruso v. Yamhill County, 422 F.3d 848 (9th Cir. September 6, 2005) (No. CV-03-01731-ALH).....App. 1

Caruso v. Yamhill County, 2004 WL 2005626 (D. Or. January 14, 2004) (No. CV-03-01731-ALH) ...App. 29

Horton v. Multnomah County, Opinion and Order of October 17, 2003 (No. CV-03-1257-HA).....App. 43

Caruso v. Yamhill County, ___ F.3d ___ (9th Cir. November 15, 2005) (No. CV-03-01731-ALH).....App. 59

Oregon Constitution, Article XI, § 11(1).....App. 60

O.R.S. § 250.195 Procedure for elector dissatisfied with title of county measure .....App. 62

O.R.S. § 280.070 Manner of holding elections for local option tax or permanent rate limit; additional statements in ballot title .....App. 63

Yamhill County's Official Ballot Title for Measure No. 36-55 for election of March 9, 2004 .....App. 65

422 F.3d 848

United States Court of Appeals,
Ninth Circuit.

Michael CARUSO, Plaintiff-Appellee,
v.
YAMHILL COUNTY, an Oregon municipal corporation, by and through its COUNTY COMMISSIONER, Defendant,
and
State of Oregon, Intervenor-Appellant.

No. 04-35155.

Argued and Submitted May-3, 2005.
Filed Sept. 6, 2005.

Stephen K. Bushong, Oregon Department of Justice, Salem, OR, for the intervenor-appellant.

Daniel W. Meek, Portland, OR, for the plaintiff-appellee.

Appeal from the United States District Court for the District of Oregon; Ancer L. Haggerty, District Judge, Presiding. D.C. No. CV-03-01731-ALH.

Before: HUG, TASHIMA, and CLIFTON, Circuit Judges.

CLIFTON, Circuit Judge:

The State of Oregon appeals a district court order declaring Or.Rev.Stat. § 280.070(4)(a) unconstitutional and permanently limiting its enforcement. Section 280.070(4)(a) requires that ballots for initiatives proposing local option taxes include a statement: "This measure may cause property taxes to increase more than three percent." The district court deemed this requirement constitutionally infirm,

concluding that inclusion of the "three-percent warning" violated appellee Michael Caruso's First Amendment rights as a petition circulator and his due process rights as a voter. We conclude that the requirement does not violate the U.S. Constitution, reverse the decision of the district court, and vacate the injunction limiting enforcement of section 280.070(4)(a).

I. BACKGROUND

The Oregon Constitution reserves to the people "the initiative power, which is to propose laws and amendments to the Constitution and enact or reject them at an election independently of the Legislative Assembly." Or. Const. art. IV, § 1. Under Oregon law, the ballot titles for initiatives that propose the imposition of a local option tax must include an additional statement commonly referred to as the "three-percent warning": "This measure may cause property taxes to increase more than three percent." Or.Rev.Stat. § 280.070(4)(a).

Appellee Michael Caruso was among the chief petitioners for an initiative measure which appeared on the ballot for the March 9, 2004, Yamhill County Special Election. Consistent with section 280.070(4)(a), the Yamhill County Commission adopted, on November 26, 2003, the following ballot title for the measure:

MEASURE 36-55
AUTHORIZES SPECIAL LEVY IF YAMHILL COUNTY PUD[1] IS FORMED

QUESTION: Shall voters authorize levy of $0.003 per $1,000 of assessed valuation if Yamhill County People's Utility District is formed?

This measure may cause property taxes to increase more than three percent.

SUMMARY: This measure may be passed only at an election with at least a 50 percent voter turnout.

If the Yamhill County People's Utility District is formed, this measure allows the District board of directors to impose a special levy on property within the district. Funds raised from the levy would be used to pay for an engineer's report and a later election to issue revenue bonds, if held.

This one-time levy will raise about $9,700.00. The levy for a house with an assessed value of $150,000 would be about 45 cents.

The estimated tax cost for this measure is an ESTIMATE ONLY based on the best information available from the county assessor at the time of the estimate.

See also Or.Rev.Stat. § 250.035(1) (providing that the ballot title of any non-state initiative shall consist of a caption, question, and summary).

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[1] Formation of the Yamhill County People's Utility District ("PUD") was proposed by Measure 36-54, which appeared on the same ballot.

Caruso challenged the constitutionality of section 280.070(4)(a) before the district court, asserting that the required inclusion of the three-percent warning violated his First Amendment rights as a petition circulator and his due process rights as a voter. Caruso requested that the district court declare the provision unconstitutional, both as applied to Measure 36-55 and on its face, and enter preliminary and permanent injunctions against its enforcement.

With the parties' consent, the district court consolidated the hearing on Caruso's motion for a preliminary injunction with the trial on the merits. In an opinion issued the day after the hearing, the district court held section 280.070(4)(a) unconstitutional as applied and as enacted. Adopting the reasoning set forth in a companion decision, *Horton v. Multnomah County*, No. Civ. 03-1257-HA, 2004 WL 1745789 (D.Or. Aug.4, 2004), the district court deemed the three-percent warning "false and misleading" because it implied that the initiative measure "by itself" "may cause property taxes to increase more than three percent" when the increase proposed by Measure 36-55 was in fact much lower: only "$0.003 per $1,000 of assessed valuation."

The district court reasoned that section 280.070(4)(a) was therefore constitutionally infirm. First, it impeded Caruso's ability to communicate the actual tax consequences of Measure 36-55 and forced him to be associated with the State's misleading message. In light of these burdens on "core political speech," the district court determined that section 280.070(4)(a) was subject to, and did not survive, strict scrutiny under the First Amendment. Second, section 280.070(4)(a) substantially chilled protected speech. Specifically, because the three-percent

warning applied to all initiatives proposing local option taxes – including those which posed no threat of themselves increasing property taxes more than three percent – it discouraged others from circulating such initiatives by erecting the additional "hurdle of convincing voters of the false nature of the state mandated 'warning.'" Finally, the three-percent warning obscured the actual subject of Measure 36-55, upsetting the evenhandedness of the election and working a fundamental unfairness on the voters.

To remedy these constitutional infirmities, the district court enjoined the government defendants from enforcing section 280.070(4)(a) in relation to Measure 36-55, and, more broadly, in relation to "all ballot measures that by themselves cannot cause an increase in property taxes of more than three percent." The State of Oregon, which had intervened to oppose Caruso's claims, timely appealed.[2]

II. DISCUSSION

A. Mootness

Pursuant to the district court injunction, Measure 36-55 appeared on the ballot for the March 9, 2004, Yamhill County Special Election without the three-percent warning. The measure failed, with 3,250 voters favoring the levy and 9,153 opposing it. The State argues that the election rendered moot Caruso's claim that section 280.070(4)(a) is unconstitutional as applied to the defeated measure.

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[2] The named defendant, Yamhill County, also participated in the proceedings below. It did not appeal the judgment of the district court.

As a general rule, a case is moot "'when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.'" *Schaefer v. Townsend*, 215 F.3d 1031, 1033 (9th Cir.2000) (quoting *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969)). There is an exception, however, for challenged practices that are "'capable of repetition, yet evading review.'" *Id.* (quoting *Dunn v. Blumstein*, 405 U.S. 330, 333 n. 2, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972)). Under this exception, a court may consider the merits of a case that would otherwise be deemed moot when "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Spencer v. Kemna*, 523 U.S. 1, 17, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998) (alterations and citation omitted).

Cases challenging election laws often fall within the "capable of repetition, yet evading review" exception "because the inherently brief duration of an election is almost invariably too short to enable full litigation on the merits." *Porter v. Jones*, 319 F.3d 483, 490 (9th Cir.2003). For this reason, "[i]f such cases were rendered moot by the occurrence of an election, many constitutionally suspect election laws . . . could never reach appellate review." *Joyner v. Mofford*, 706 F.2d 1523, 1527 (9th Cir.1983). Here, the State cannot seriously contest that the period between adoption of the ballot title and election on the measure – in this case, four months – is too brief to permit "full litigation on the merits." *See Meyer v. Grant*, 486 U.S. 414, 417 n. 2, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988) (finding the "evading review" prong satisfied where the

state "grant[ed] the proponents of an initiative only six months in which to obtain the necessary signatures").

The State more forcefully contests the expectation that Caruso "will be subject to the same action again." It observes that there is no evidence in the record that Caruso has circulated or intends to circulate another initiative proposing the imposition of a local option tax. Although this is true, we have rejected the analogous argument that a candidate's challenge to an election law is not moot "*only* when [the] candidate plans to seek reelection." *Schaefer*, 215 F.3d at 1033. In *Schaefer*, we observed that the Supreme Court had proceeded to the merits of a voter's challenge to the residency requirements for voting even though by the time of the Court's decision, the voter had resided in the state long enough to vote in the next election. *Id.* at 1033 (citing *Blumstein*, 405 U.S. at 331-33 & n. 2, 92 S.Ct. 995). We accordingly examined the merits of a prospective candidate's challenge to the residency requirements for nomination even though by the time of our decision, the contested seat had been filled and the candidate "refuse[d] to disclose his intentions" for running for state office in the future. *Id.*; *accord Merle v. United States*, 351 F.3d 92, 95 (3d Cir.2003) (disagreeing with the suggestion that a candidate must allege his intent to run in a future election to satisfy the "capable of repetition" requirement).

Consistent with *Schaefer*, we conclude that Caruso's claims are not moot. Although Caruso has not expressed an intention to circulate similar initiatives in the future, enforcement of section 280.070(4)(a) is nevertheless "capable of repetition, yet evading review." Accordingly, we proceed to the merits.

B. Constitutional and Statutory Context

We begin by setting forth the context in which we must examine section 280.070(4)(a). Before 1997, property in Oregon was assessed and taxed at its real market value. *See* Or.Rev.Stat. § 308.232 (1995). Then, in 1997, Oregon voters adopted Measure 50, which amended the Oregon Constitution to limit the property taxes imposed by Oregon counties. *See Flavorland Foods v. Wash. County Assessor*, 334 Or. 562, 54 P.3d 582, 583-84 (2002) (en banc). First, Measure 50 "rolled back" a property's maximum assessed value for the tax year beginning July 1, 1997, to its "real market value for the tax year beginning July 1, 1995, reduced by 10 percent." Or. Const. art. XI, § 11(1)(a). Second, "[f]or tax years beginning after July 1, 1997," Measure 50 provided that a "property's maximum assessed value shall not increase by more than three percent from the previous tax year." *Id.* § 11(1)(b). Third, Measure 50 established a "permanent limit on the rate of ad valorem property taxes imposed" by each local taxing district. *Id.* § 11(3)(b). This limit is commonly referred to as the "permanent rate." *See Shilo Inn v. Multnomah County*, 333 Or. 101, 36 P.3d 954, 958 (2001), *modified by* 334 Or. 11, 45 P.3d 107 (2002).

The limits imposed by Measure 50, however, were subject to an exception for taxes submitted to and approved by the voters:

> A local taxing district other than a school district may impose a local option ad valorem property tax that exceeds the limitations imposed under this section by submitting the question of the levy to voters in the local taxing district and obtaining the approval of a majority of the voters voting on the question.

Or. Const. art. XI, § 11(4)(a)(A). The conditions for submitting local option taxes to the voters are provided for by Oregon statutes. *See* Or.Rev.Stat. §§ 280.070-.075. These statutes require that the ballot titles for such measures include, in addition to the three-percent warning, "the period during which the proposed local option tax will be imposed," "[t]he first fiscal year in which the proposed local option tax will be imposed," and "the total amount of money to be raised by the proposed local option tax, in dollars and cents." *Id.* §§ 280.070(4)(a), 280.070(5)(a)-(b), 280.075(1). Against this constitutional and statutory backdrop, we consider Caruso's First and Fourteenth Amendment challenges.

C. First Amendment

Caruso contends that section 280.070(4)(a) infringed upon his complementary First Amendment rights "to speak freely and . . . to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977). Specifically, he contends that the three-percent warning restricted his ability to communicate accurately the tax consequences of Measure 36-55 and forced him instead to be associated with the State's misleading communication. The district court agreed. Where, as here, a district court sustains a constitutional challenge to a restriction on speech, its findings of fact are reviewed for clear error. *Lovell ex. rel. Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 370 (9th Cir.1996). Its application of law to those facts and its ultimate determination that the restriction is unconstitutional, however, are reviewed de novo. *Mont. Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1090 (9th Cir.2003).

1. Level of Scrutiny

We turn at the outset to the appropriate level of First Amendment scrutiny, pausing first to reject the State's suggestion that no scrutiny is warranted because the speech regulated by section 280.070(4)(a) is the government's. We have elsewhere identified "several recognized instances of constitutional limitations on government speech." *R.J. Reynolds Tobacco Co. v. Shewry*, 384 F.3d 1126, 1140 (9th Cir.2004). For example, the First Amendment may limit government speech that "make[s] private speech difficult or impossible," *id.*, or that attributes a government message to a private speaker, *see Johanns v. Livestock Mktg. Ass'n*, ___ U.S. ___-___ & nn. 7-8, 125 S.Ct. 2055, 2064-65 & nn. 7-8, 161 L.Ed.2d 896 (2005). Caruso argues that section 280.070(4)(a) inflicted both types of harm.

a. Election Laws

An election law that burdens First Amendment rights is not necessarily subject to strict scrutiny, however. *See Clingman v. Beaver*, ___ U.S. ___, ___, 125 S.Ct. 2029, 2038, 161 L.Ed.2d 920 (2005). Rather, such laws are generally subject to a balancing standard, under which a reviewing court weighs the "character and magnitude" of the burden imposed against the interests advanced to justify that burden. *See e.g., Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997); *Burdick v. Takushi*, 504 U.S. 428, 434, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983). As the Supreme Court explained in *Burdick*, it has typically applied this "more flexible" standard to election laws because "[c]ommon sense, as well as constitutional

law, compels the conclusion that government must play an active role in structuring elections." 504 U.S. at 433, 112 S.Ct. 2059; *accord Clingman*, 125 S.Ct. at 2039 (explaining that subjecting every electoral regulation to strict scrutiny would "hamper the ability of States to run efficient and equitable elections").

To be sure, the Supreme Court has in several other cases subjected election laws to strict scrutiny rather than flexible balancing. *See, e.g., McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345-46, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995); *Meyer v. Grant*, 486 U.S. 414, 420, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988). Unlike the cases described above, these cases did not involve regulations of the "voting process"; they instead involved regulations of – or, more precisely, limitations on – "pure speech." *See McIntyre*, 514 U.S. at 345, 115 S.Ct. 1511; *accord Campbell v. Buckley*, 203 F.3d 738, 745 (10th Cir.2000) ("[S]trict scrutiny is applied where the government restricts the overall quantum of speech available to the election or voting process."). Although these cases "do not lend themselves to a simple synthesis," *Campbell*, 203 F.3d at 745, we regard them as distinguishable in two respects.

First, unlike the provisions challenged in *McIntyre* and *Meyer* (which respectively prohibited the distribution of anonymous campaign literature, *McIntyre*, 514 U.S. at 336, 115 S.Ct. 1511, and the payment of petition circulators, *Meyer*, 486 U.S. at 416, 108 S.Ct. 1886), section 280.070(4)(a) governs the political process more than it does political speech. *See McIntyre*, 514 U.S. at 344, 115 S.Ct. 1511. Significantly, the provision regulates only what is said through the ballot itself. *See Timmons*, 520 U.S. at 362-63, 117 S.Ct. 1364 (applying flexible balancing where the challenged law burdened a political party's

ability to communicate through the ballot only); *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1015 (9th Cir.2002) (similar). All other means of communication, including the "interactive" discussions for which First Amendment protection is "at its zenith," *Meyer*, 486 U.S. at 422, 425, 108 S.Ct. 1886, fall outside the provision's regulatory scope.

Caruso responds that the ballot is not merely *a* means of communication; it is *the* most direct and credible means of communication. This argument has some force. Indeed, the Supreme Court has characterized "'the instant before the vote is cast'" as "'the most crucial stage in the election process.'" *Cook v. Gralike*, 531 U.S. 510, 525, 121 S.Ct. 1029, 149 L.Ed.2d 44 (2001) (quoting *Anderson v. Martin*, 375 U.S. 399, 402, 84 S.Ct. 454, 11 L.Ed.2d 430 (1964)). But the fact that the ballot is "crucial" to an election does not imply that Caruso therefore has a First Amendment right to communicate a specific message through it. To the contrary, the Supreme Court in *Timmons* rejected the "contention that[a political party] has a right to use the ballot itself to send a particularized message"; "Ballots serve primarily to elect candidates, not as forums for political expression." 520 U.S. at 362-63, 117 S.Ct. 1364; *accord Rubin*, 308 F.3d at 1016 ("A ballot is a ballot, not a bumper sticker.").

Caruso argues that cases such as *Timmons* are inapposite because they involved candidates rather than initiatives. We disagree. In *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999), a case involving ballot initiatives, the Supreme Court expressly affirmed the Tenth Circuit's reliance on *Timmons*. *See id.* at 190, 119 S.Ct. 636. The Supreme Court further affirmed that "States allowing

ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally." *Id.* at 191, 119 S.Ct. 636. It is true that the Supreme Court has elsewhere highlighted the differences between initiatives and candidates, but it appears to have done so not because the First Amendment is more protective of initiatives than of candidates, but because elections on initiatives pose lesser risks of *quid pro quo* corruption. *See, e.g., First Nat'l Bank v. Bellotti*, 435 U.S. 765, 790, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) ("The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue." (citations omitted)).

Caruso also observes that notwithstanding *Timmons*, Chief Justice Rehnquist in *Cook* applied strict scrutiny to an amendment governing the composition of Missouri ballots. *See Cook*, 531 U.S. at 530-32, 121 S.Ct. 1029 (Rehnquist, C.J., concurring in the judgment). Specifically, the amendment required that ballots label candidates for congressional office who "DISREGARDED VOTERS' INSTRUCTIONS ON TERMS LIMITS" or "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS." *Id.* at 514-15, 121 S.Ct. 1029. Chief Justice Rehnquist described the requirement as constitutionally suspect in part because it was "not neutral as to issues or candidates." *Id.* at 532, 121 S.Ct. 1029. To the contrary, only one issue was selected for comment and "only those candidates who fail[ed] to conform to the State's position receive[d] derogatory labels." *Id.*

Caruso maintains that here, just as Chief Rehnquist described in *Cook*, the State selected a single consideration for comment on the ballot. As an initial matter, we note that Chief Justice Rehnquist's opinion in *Cook* was a

concurrence, joined only by Justice O'Connor. *Id.* at 530, 121 S.Ct. 1029. In contrast to Chief Justice Rehnquist's concurring opinion, the majority opinion reviewed Missouri's labeling requirement under the Tenth Amendment and the Elections Clause rather than under the First Amendment. *Id.* at 518-27, 121 S.Ct. 1029. In fact, the majority specifically rejected the respondents' reliance on "First Amendment cases upholding 'time, place, and manner' regulations of speech," explaining that "[a]lthough the Elections Clause uses the same phrase as that branch of our First Amendment jurisprudence, it by no means follows that such cases have any relevance to our disposition of this case." *Id.* at 527 n. 20, 121 S.Ct. 1029.

But even apart from its precedential value, we regard Chief Justice Rehnquist's concurring opinion as distinguishable. Unlike Missouri's labeling requirement, which applied to "only those candidates who fail[ed] to conform to the State's position," *id.* at 532, 121 S.Ct. 1029, Oregon's three-percent warning applies to all "measure[s] authorizing the imposition of local option taxes," Or.Rev.Stat. § 280.070(4)(a). Accordingly, no measure or group of measures is "singled out." *Compare Cook*, 531 U.S. at 532, 121 S.Ct. 1029. And unlike congressional candidates, who "may debate tax reform, Social Security, national security, and a host of other issues," *id.*, initiative measures, by law, may "embrace one subject only," Or. Const. art. IV, § (2)(d). For Measure 36-55, that subject was a one-time increase in property taxes. The measure's possible effect on property taxes, then, was not simply one facet of many. Finally, unlike the State of Missouri, which "ha[d] chosen one and only one issue to comment on," *id.*, the State of Oregon has chosen to comment not only on a measure's

possible effect on property taxes, but also on the rate of the special levy, the voter turnout required to pass it, the proposed uses for the funds, the total amount of funds anticipated, and the estimated additional cost to property owners.

Second, and also unlike the provisions challenged in *McIntyre* and *Meyer*, section 280.070(4)(a) does not have "the inevitable effect of reducing the total quantum of speech on a public issue." *Meyer*, 486 U.S. at 423, 108 S.Ct. 1886; *accord McIntyre*, 514 U.S. at 346, 115 S.Ct. 1511. In *Meyer*, the Supreme Court determined that Colorado's ban on the use of the paid petition circulators "limit[ed] the number of voices who will convey appellees' message and the hours they can speak," thus restricting their ability to reach a larger audience, "garner the number of signatures necessary to place the matter on the ballot," and "make the matter the focus of statewide discussion." 486 U.S. at 422-23, 108 S.Ct. 1886. The Court quoted the observation made by the Colorado Supreme Court in another context: "'[T]he solicitation of signatures on petitions is work. It is time-consuming and it is tiresome – so much so that it seems that few but the young have the strength, the ardor and the stamina to engage in it, unless, of course, there is some remuneration.'" *Id.* at 423-24, 108 S.Ct. 1886 (quoting *Urevich v. Woodard*, 667 P.2d 760, 763 (Colo.1983)).

In contrast, the effect of the three-percent warning on the "total quantum of speech" is uncertain. In a declaration submitted to the district court, Caruso predicted that continued enforcement of the three-percent-warning requirement would discourage petition circulators "as they w[ould] realize that all of their work can and will be nullified by the false statement that will appear on the ballot." But Caruso's prediction – unsupported by any

evidence in the record, *compare Am. Constitutional Law Found.*, 525 U.S. at 198, 119 S.Ct. 636 (describing the testimony of several petition circulators who recounted the harassment and fear that they and others had experienced as a result of the requirement that they wear identification badges) – is not the only plausible one. In fact, the requirement "might encourage more speech," *Campbell*, 203 F.3d at 745, with petition circulators working not only to collect signatures, but also to inform voters that their measures would not, by themselves, increase property taxes more than three percent. Along these lines, we note that the three-percent warning required by section 280.070(4)(a) is "separated from the moment the circulator speaks," leaving circulators free to contest its accuracy in their conversations with electors. *Compare Am. Constitutional Law Found.*, 525 U.S. at 198-200, 119 S.Ct. 636 (explaining that Colorado's affidavit requirement, unlike its identification badge requirement, "exemplifies the type of regulation for which *McIntyre* left room" because it "must be met only after circulators have completed their conversations with electors").

b. Compelled Speech

Caruso contends that section 280.070(4)(a) should be subject to strict scrutiny for the additional reason that it forced him to be associated with the State's message. *See Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 32-33, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986); *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977). Yet unlike the requirements challenged in *Pacific Gas & Electric* and *Wooley*, section 280.070(4)(a) does not require that owners use their private property to transmit the State's message. *See Pac. Gas & Elec. Co.*, 475 U.S. at 17-18, 106

S.Ct. 903 (invalidating an order requiring a utility company "to use its property – the billing envelopes – to distribute the message of another"); *Wooley*, 430 U.S. at 714, 97 S.Ct. 1428 (invalidating a New Hampshire law requiring drivers to use their cars as a "'mobile billboard' for the State's ideological message"). The provision instead provides for the State's message to be transmitted through ballots, documents prepared, printed, and distributed by – and therefore attributed to – State and local governments. *See Timmons*, 520 U.S. at 356, 117 S.Ct. 1364; *see also Johanns*, 125 S.Ct. at 2065, 125 S.Ct. 2055 ("[T]his second [compelled speech] theory might . . . form the basis for an as-applied challenge – if it were established, that is, that individual beef advertisements were attributed to respondents.").

Nor does section 280.070(4)(a) require the "affirmation of a belief." *Bd. of Educ. v. Barnette*, 319 U.S. 624, 633, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). Oregon law requires that the ballot title for a county initiative be prepared by the district attorney, not by the petitioner. *See* Or.Rev.Stat. § 250.175(3). Indeed, in his declaration, Caruso opined that voters view the three-percent warning as "an official statement of government." No part of section 280.070(4)(a) required Caruso to affirm the government's statement; rather, he remained free to publicly dissociate himself from it. *See PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980).

We thus find the present appeal distinguishable from both the election law cases and the compelled speech cases in which the Supreme Court has applied strict scrutiny. We accordingly apply the Supreme Court's more flexible balancing standard.

2. Balancing Standard

Under this standard, "the rigorousness of [a reviewing court's] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick*, 504 U.S. at 434, 112 S.Ct. 2059. "[W]hen those rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Id.* (quoting *Norman v. Reed*, 502 U.S. 279, 289, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992)). But when those rights are subjected only to "'reasonable, nondiscriminatory'" restrictions, "'the State's important regulatory interests are generally sufficient.'" *Id.* (quoting *Anderson*, 460 U.S. at 788, 103 S.Ct. 1564).

a. Burden

Caruso argues that section 280.070(4)(a) imposed a "severe" burden on his communication with voters by requiring that the ballot title for Measure 36-55 include the "false and misleading" warning that "[t]his measure may cause property taxes to increase more than three percent." This warning, Caruso maintains, implied that Measure 36-55 *by itself* might cause property taxes to increase more than three percent when the measure in fact proposed a much lower increase of 0.0003 percent. Because the material facts are not in dispute, "the character and extent of the statute's burden involves a question of law," which we review de novo. *Krislov v. Rednour*, 226 F.3d 851, 859 (7th Cir.2000) (citing *(WIN) Wash. Initiatives Now v. Rippie*, 213 F.3d 1132, 1137 (9th Cir.2000)).

Mindful of the constitutional backdrop against which section 280.070(4)(a) was enacted, we reject Caruso's

assumption that his is the only reasonable interpretation of the three-percent warning. As discussed above, the Oregon Constitution provides that a "property's maximum assessed value shall not increase by more than three percent from the previous tax year." Or. Const. art. XI, § 11(1)(b). But this limitation may be exceeded by local option taxes submitted to and approved by voters in the taxing district. *Id.* § 11(4)(a)(A). When construed in context, then, the three-percent warning could be read as an accurate reminder that the local option tax proposed by Measure 36-55 would not be subject to the limitation imposed by the Oregon Constitution. In other words, absent approval of Measure 36-55, maximum assessed values and, in turn, property taxes could increase by no more than three percent. *Id.* § 11(1)(b). If the measure were approved, however, property taxes could increase by more than that amount. *Id.* § 11(4)(a)(A).

Caruso offers several reasons to reject this reading: (a) voters are unlikely to know of the constitutional three-percent limit; (b) the constitutional three-percent limit applies to maximum assessed values, not property taxes; (c) there is only an "infinitesimal possibility" that other property taxes will increase three percent; and (d) even if other property taxes increased three percent, it would not be Measure 36-55 that would "cause" total taxes to increase more than that amount. We address these reasons in turn.

As to voters' knowledge, we note that Measure 50, which imposed the three-percent limit, was adopted by referendum. *Flavorland Foods*, 54 P.3d at 583-84. Before the election on Measure 50, voters would have been presented with summaries of its impact on the ballot and in the voters' pamphlet. Or.Rev.Stat. §§ 250.035(2)(d),

251.185(1). It is also likely that the ballot issue was the subject of discussion and press coverage leading up to election day. We further note that Measure 50 replaced Measure 47, a "short-lived constitutional amendment" which had been enacted by the voters by ballot initiative the year before the approval of Measure 50, and which included substantially the same property tax limitations. *See Flavorland Foods*, 54 P.3d at 583 (explaining that "'[c]ertain practical and technical difficulties in the application of Measure 47 led the legislature to propose, and the people to adopt, Measure 50 as its effective replacement'" (quoting *Shilo Inn*, 36 P.3d at 958 n. 6)). As such, voters would have been presented with substantially identical summaries before the election on Measure 47 as well. Accordingly, although voters might not have had perfect knowledge of the Oregon property tax system, they were likely aware of the constitutional three-percent limit, which not only was the subject of two separate ballot measures, both of which the voters approved, but which also affected the calculation of property taxes for every year since its adoption.

As to the difference between maximum assessed values and property taxes and the likelihood that the latter will increase by three percent, Caruso's assertions are undermined by other limitations imposed by Measure 50. Taken together, these limitations create more than an "infinitesimal possibility" that property taxes will increase three percent. As described above, in addition to imposing the three-percent limit, Measure 50 "rolled back" properties' maximum assessed values for the tax year beginning July 1, 1997, and established a "permanent limit on the rate of ad valorem property taxes imposed" by each local taxing district. Or. Const. art. XI, § 11(1)(a)-(3)(b). The

State informs us that real market values, meanwhile, have been "generally rising." The result is that for tax years beginning after July 1, 1997, a property's assessed value – defined as "the lesser of: (a) The property's maximum assessed value; or (b) The property's real market value," Or.Rev.Stat. § 308.146 – is likely to equal its maximum assessed value. And as maximum assessed values increase by three percent per year, property taxes increase by the same amount because they are imposed at the permanent rate established by Measure 50.[3]

Finally, as to the "cause" of a greater-than-three-percent increase in property taxes, predictable three-percent increases in property taxes suggest that local option taxes may in fact "produce[ ]" an increase of more than that amount. *See* Black's Law Dictionary 234 (8th ed.2004) (defining "cause" as "[s]omething that produces an effect or result"). That is, absent approval of a local option tax, maximum assessed values and, frequently, assessed values and property taxes could increase by no more than three percent. Or. Const. art. XI, § 11(1)(b). If a local option tax is approved, however, it could produce an increase of more than that amount. *Id.* § 11(4)(a)(A).

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[3] We do not dispute that the real market values for some properties may be decreasing. For these properties, the likelihood that property taxes would increase by three percent in a given year would be much lower, because assessed values would likely equal decreasing real market values rather than incrementally increasing maximum assessed values. But particularly in the absence of evidence that a substantial portion of Oregon properties fit this description, we decline to condition application of section 280.070(4)(a) on the real market values of individual properties. Doing so would effectively "tie the hands" of the State. *See Burdick*, 504 U.S. at 434, 112 S.Ct. 2059.

Certainly, the three-percent warning could also be read to suggest that Measure 36-55 *by itself* might cause property taxes to increase more than three percent, but we regard its interpretation as an accurate reminder that the measure would not be subject to the constitutional three-percent limit to be at least as plausible. For this reason, we do not characterize the burden imposed by section 280.070(4)(a) as "severe." Rather, like the Fourth Circuit, we believe that we may not declare a State's ballot language unconstitutionally burdensome "merely because it could conceivably mislead some individuals and could have been crafted more adroitly." *Cf. McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1227 (4th Cir.1995) (rejecting constitutional challenges to the allegedly misleading heading printed on voter petitions because the court could not say that the language "permits of only one interpretation" (internal quotation marks omitted)).

b. Interest

Where, as here, a state election law imposes restrictions on speech that are not severe, " 'the State's important regulatory interests are generally sufficient' " to justify it. *Burdick*, 504 U.S. at 434, 112 S.Ct. 2059 (quoting *Anderson*, 460 U.S. at 788, 103 S.Ct. 1564). The State maintains that section 280.070(4)(a) advances its interest in reminding voters that approving a local option tax effectively waives the constitutional three-percent limit. The sufficiency of this interest presents a question of law, which we review de novo. *See McClure v. Galvin*, 386 F.3d 36, 41-45 (1st Cir.2004).

The Supreme Court has consistently acknowledged states' legitimate interest in "fostering informed and

educated expressions of the popular will." *Anderson*, 460 U.S. at 796, 103 S.Ct. 1564; *see, e.g.*, *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 228, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989); *Jenness v. Fortson*, 403 U.S. 431, 442, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971). By requiring inclusion of the three-percent warning as a "shorthand designation" of an initiative's potential tax consequences, section 280.070(4)(a) "plays a role in the process by which voters inform themselves for the exercise of the franchise." *Cf. Tashjian v. Republican Party*, 479 U.S. 208, 220, 107 S.Ct. 544, 93 L.Ed.2d 514 (1986) (observing that "party labels provide a shorthand designation of the views of party candidates on matters of public concern"); *compare McIntyre*, 514 U.S. at 348-49, 115 S.Ct. 1511 (noting that "in the case of a handbill written by a private citizen who is not known to the recipient, the name and address of the author add little, if anything, to the reader's ability to evaluate the document's message").

We are mindful that a state's asserted interest in informing voters will not necessarily justify the burdens its regulations impose on First Amendment rights. For example, "[a] state's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism." *Anderson*, 460 U.S. at 798, 103 S.Ct. 1564. Skepticism is also warranted if a state goes beyond "merely" providing information about candidates to "handicap[ping]" them. *Cook*, 531 U.S. at 525, 121 S.Ct. 1029 (internal quotation marks omitted). Section 280.070(4)(a), however, neither restricts information nor handicaps initiatives. It instead provides additional information, "'open[ing] the channels of communication rather than . . . clos[ing] them,'" and applies equally to all initiatives

proposing local option taxes, leaving no measure at a "political disadvantage." *Compare Anderson*, 460 U.S. at 798, 103 S.Ct. 1564 (quoting *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 770, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976)); *Cook*, 531 U.S. at 525, 121 S.Ct. 1029. We note, too, that the State enacted section 280.070(4)(a) as part of a statutory scheme requiring that ballot titles for local option taxes include not only the three-percent warning, but also the rate, period, amount, and purpose of the proposed option tax. *See* Or.Rev.Stat. §§ 280.070, 280.075. The State's directing attention to this variety of considerations is in our view more consistent with an interest in informing voters than with an interest in influencing them. *Compare Anderson*, 375 U.S. at 402, 84 S.Ct. 454 ("[B]y directing the citizen's attention to the single consideration of race or color, the State . . . may [d]ecisively influence the citizen to cast his ballot along racial lines.").

As stated above, the three-percent warning might have been more clearly worded. For example, Article XI-A, section 4 of the Oregon Constitution, which authorizes a separate statewide property tax for the purpose of repaying the principal and interest of bonds, provides that "said tax levy hereby authorized shall be in addition to all other taxes which may be levied according to law." Or. Const. art. XI-A, § 4. But because the three-percent warning, even as presently worded, does not impose a severe burden on Caruso's First Amendment rights, "the State need not narrowly tailor the means it chooses to promote [its interests]." *See Timmons*, 520 U.S. at 365, 117 S.Ct. 1364.

The district court deemed section 280.070(4)(a) insufficiently tailored in a different respect: specifically, in its application to all measures proposing the imposition of a

local option tax; even those which by themselves cannot cause property taxes to increase more than three percent. The district court concluded that the general applicability of section 280.070(4)(a) rendered it substantially overbroad and therefore facially invalid. *See Broadrick v. Oklahoma*, 413 U.S. 601, 615-16, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

We disagree. If, as the district court ordered, application of section 280.070(4)(a) were limited to measures which themselves could cause property taxes to increase more than three percent, the statute would be rendered largely ineffective in increasing the information available to voters. Under a separate provision of Oregon law, the ballot titles for measures proposing local option taxes must declare the "dollar rate per thousand dollars assessed value." Or.Rev.Stat. § 280.060(1)(b). Voters can thus readily identify ballot measures that themselves may cause property taxes to increase more than three percent. What voters are less likely to readily identify are those ballot measures that propose lower dollar rates, but which, if approved, will be levied outside the three-percent limit imposed by the Oregon Constitution. *See* Or. Const. art. XI, § 11(4)(a)(A). In our view, then, the general applicability of section 280.070(4)(a) does not burden substantially more speech than is justified by the State's important interests.

In sum, we conclude that the First Amendment burden imposed by section 280.070(4)(a) is not severe and further that that burden is justified by the State's important interest in encouraging informed and educated voting. We accordingly conclude that section 280.070(4)(a) does not violate the First Amendment, either as applied to Measure 36-55 or on its face.

D. Fourteenth Amendment

In addition to his First Amendment claims, Caruso asserts a Fourteenth Amendment claim, arguing that required inclusion of the "false and misleading" three-percent warning violates his rights to substantive due process. We review the claim de novo. *See Mont. Chamber of Commerce v. Argenbright*, 226 F.3d 1049, 1054 (9th Cir.2000).

"Several appellate courts, including our own, have held that an election is a denial of substantive due process if it is conducted in a manner that is fundamentally unfair." *Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir.1998). To prevail on his substantive due process claim, then, Caruso must demonstrate that "'the state's choice of ballot language so upset[s] the evenhandedness of the [election] that it work[s] a 'patent and fundamental unfairness' on the voters.'" *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 858 (9th Cir.2002) (quoting *Burton v. Georgia*, 953 F.2d 1266, 1269 (11th Cir.1992)). The parties agree that such an exceptional case would arise if, for example, the ballot language were so misleading as to deceive voters about the subject of the measure at issue. *See id.*

Applying this standard in *National Audubon Society*, we rejected a challenge to ballot material which allegedly misled voters by understating the scope of proposed changes to California law. *Id.* at 859. The district court there concluded that an argument favoring passage of the proposition was not "materially misleading" in part because it "was not completely inaccurate." *Id.* at 858. Rather, although the argument allegedly understated the

scope of the broader of two proposed bans, it accurately described the narrower one. *Id.*

In addition, "other materials accompanying the ballot" included arguments against the proposed changes. *Id.* at 858-59. We agreed that under those circumstances, "the ballot material did not rise to the level of a substantive due process violation." *Id.* at 859.

Like the material challenged in *National Audubon Society*, the three-percent warning is "not completely inaccurate." To be sure, the three-percent warning might have been read as a misleading suggestion that Measure 36-55 by itself might cause property taxes to increase more than three percent. But, as described above, the warning might also have been read, in context, as an accurate reminder that the proposed local option tax would not be subject to the three-percent limit imposed by the Oregon Constitution. Moreover, although an average voter might have read the three-percent warning as Caruso does "'[i]f [he] had to decide what he was voting on from the [warning] alone, ... he did not have to decide from this summary.'" *Burton*, 953 F.2d at 1271 (quoting *Kohler v. Tugwell*, 292 F.Supp. 978, 981 (E.D.La.1968)). Instead, he could look to "other materials" – including the text of Measure 36-55 and the remainder of the ballot title as it appeared in the voters' pamphlet and, indeed, on the ballot itself, *see* Or.Rev.Stat. §§ 250.235, 251.315(1)(g), 280.060(1)(b) – which indicated the actual increase proposed by Measure 36-55, disclosing both the dollar rate of the proposed tax and the estimated levy for a house with an assessed value of $150,000. *See Nat'l Audubon Soc'y*, 307 F.3d at 858-59. We are thus unpersuaded that the State's choice of ballot language rose to the level of a due process violation under *National Audubon Society*.

The fact that the three-percent warning would have appeared in the ballot title for Measure 36-55 rather than in an "avowedly partisan portion of the materials" does not change our conclusion. *Compare Nat'l Audubon Soc'y*, 307 F.3d at 858 (internal quotation marks omitted). Because the three-percent warning could have been interpreted accurately, and because "other materials" would have enforced this interpretation, we cannot say that including the three-percent warning in the ballot title would have "infected" the entire election with "patent and fundamental unfairness." *Burton*, 953 F.2d at 1271 (internal quotation marks omitted).

III. CONCLUSION

For the above reasons, we conclude that Or.Rev.Stat. § 280.070(4)(a) does not violate Caruso's First Amendment or Fourteenth Amendment rights. Accordingly, we reverse the contrary determinations of the district court and vacate the injunction permanently limiting the enforcement of section 280.070(4)(a).

JUDGMENT REVERSED; INJUNCTION VACATED.

Not Reported in F.Supp.2d

United States District Court, D. Oregon.
Michael CARUSO Plaintiff,
v.
YAMHILL COUNTY, by and through its County Commission Defendants, THE STATE of Oregon, Intervenor.
No. Civ. 03-1731-HA.

filed Dec. 12, 2003.
Jan. 14, 2004.
terminated Jan. 28, 2004.
last filing Sept. 1, 2004.

Stephen K. Bushong, Trial Division, Oregon Department of Justice, Salem, OR, Attorney to be Noticed, for State of Oregon, (Intervenor Defendant).

John M. Gray, Jr., Office of County Counsel, Yamhill County Courthouse, McMinnville, OR, Lead Attorney, Attorney to be Noticed, for Yamhill County, (Defendant).

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Linda K. Williams, Linda K. Williams, PC, Portland, OR, Lead Attorney, Attorney to be Noticed, for Michael Caruso, (Plaintiff).

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John M. Gray, Yamhill County Legal Counsel, McMinnville, Oregon, for defendant Yamhill County.

Hardy Myers, Stephen K. Bushong, Oregon Department of Justice, Salem, Oregon, for intervenor State of Oregon.

OPINION and ORDER

HAGGERTY, Chief J.

Before the court is plaintiff's Motion for Preliminary and Permanent Injunction. The court heard oral argument on January 13, 2004. For the following reasons, plaintiff's Motion for Preliminary and Permanent Injunction is granted.

The parties do not dispute that the factual background and constitutional analysis involved here are nearly identical to those involved in *Horton v. Multnomah County*, CV 03-1257-HA. Given this identity of issues, the court incorporates the reasoning set forth in its October 17, 2003, Opinion and Order (hereinafter "*Horton*"), in which O.R.S. § 280.070(4) was held unconstitutional, both as applied to the challenged ballot measure title and as promulgated. The following background and analysis supplement the court's earlier ruling and explain the minor differences between *Horton* and the case at bar.

BACKGROUND

This action involves Yamhill County Ballot Measure 36-55, which is scheduled to appear on the March 9, 2004, ballot. On November 26, 2003, the Yamhill County Commission adopted the title of Measure 36-55, which states that the Measure authorizes the imposition of "a special levy on property within the district. Funds raised from the levy would be used to pay for an engineer's report and a

later election to issue revenue bonds, if held." The funds for the engineer's report would be generated from a "one-time levy" of "$.003 per $1,000 assessed valuation" of property. The title of Measure 36-55 explains, "The levy for a house with an assessed value of $150,000 would be about 45 cents." However, the title also states, "This measure may cause property taxes to increase more than three percent." This latter statement ("the three percent warning") is the subject of the current constitutional challenge.

Because Measure 36-55 authorizes a one-year local option tax, it is subject to Oregon law requiring any measure authorizing the imposition of a local option tax, no matter how small, to include the three percent warning. O.R.S. § 280.070(4). Thus, even if a measure authorizes a tax that would raise property taxes by a margin far less than one percent, the statute mandates the inclusion of three percent warning in the title.

Plaintiff contends correctly that the three percent warning is inaccurate in the context of Measure 36-55. For example, the title notes that a house with an assessed value of $150,000 would incur a one-time obligation of an additional 45 cents in taxes. That statement is factually correct. However, the three percent warning leads voters to believe that their property taxes might increase more than three percent if Measure 36-55 passed. For a house valued at $150,000, three percent of the assessed value is $4,500. Read in this manner, the three percent warning overstates the potential effect of Measure 36-55 by a factor of 10,000 (45 cents is one ten-thousandth of $4,500).

The three percent warning also overstates the potential effect of Measure 36-55 if the warning is read to mean that Measure 36-55 may increase an owner's current

property taxes by three percent. The average property owner in Yamhill County pays approximately $15.58 per $1,000 of assessed valuation per year. At that rate, a house valued at $150,000 would pay $2,337 in property taxes annually. A three percent increase of that amount is approximately $70. Under this reading, the three percent warning overestimates the potential burden a taxpayer might incur by more than 150 times of the Measure's actual impact. Regardless of whether the three percent warning overstates the potential tax consequences of Measure 36-55 by a factor of 150 or 10,000, plaintiff contends correctly that such language is inherently misleading and hinders the conveyance of accurate information to voters.

STANDARDS

The court may issue a preliminary injunction under the traditional test used by the Ninth Circuit. A preliminary injunction shall be issued if the moving party can demonstrate "either (1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and the balance of hardships tipping in [its] favor." *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 422 (9th Cir.1991) (citing *Diamontiney v. Borg*, 918 F.2d 793, 795 (9th Cir.1990)). "These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." *Hunt v. National Broadcasting Co., Inc.*, 872 F.2d 289, 293 (9th Cir.1989) (quoting *United States v. Odessa Union Warehouse Co-op*, 833 F.2d 172, 174 (9th Cir.1987)).

As to the second formulation of the test, "serious questions" are those "questions which cannot be resolved one way or the other at the hearing on the injunction and as to which the court perceives a need to preserve the status quo. . . ." *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir.1988). Serious questions are "substantial, difficult and doubtful" enough to require more considered investigation. *Id.* Such questions need not show a certainty of success, nor even demonstrate a probability of success, but rather "must involve a 'fair chance of success on the merits.'" *Id.* (quoting *National Wildlife Fed'n v. Coston*, 773 F.2d 1513, 1517 (9th Cir.1985)).

DISCUSSION

A. Jurisdiction and Preclusion

Unlike the procedural posture of *Horton*, defendants do not contend that this court lacks jurisdiction to review the constitutional challenges to the title of Measure 36-55. Thus, the *Rooker-Feldman* issue presented in *Horton* is absent here. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 486, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923). Additionally, defendants have asserted no defense related to issue preclusion.

B. First Amendment Challenge

As noted above, the court adopts the reasoning set forth in *Horton* and finds that the three percent warning constitutes false and misleading language in the context of Measure 36-55. By requiring the title of Measure 36-55 to contain the three percent warning, O.R.S. § 280.070(4)

offends the First Amendment and "impedes the sponsors' opportunity to disseminate their views to the public." *Meyer v. Grant,* 486 U.S. 414, 419, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988) (citing with approval *Grant v. Meyer,* 828 F.2d 1446, 1453-1454 (10th Cir.1987)). Additionally, for the reasons provided in *Horton,* the court finds that plaintiff's right to be free from coerced government-sponsored speech is violated by O.R.S. § 280.070(4).

Defendants contend that the First Amendment analysis in *Horton* is erroneous because the three percent warning is "state speech" and therefore does not inhibit plaintiff's ability to communicate with voters or impair plaintiff's right to be free from coerced government-sponsored speech. The authority cited by defendants on this point is unpersuasive. *Timmons v. Twin City Area New Party,* 520 U.S. 351, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997), involved a constitutional challenge to Minnesota's antifusion law, which prohibited any political candidate from appearing as the nominee of more than one political party on a state election ballot. The Supreme Court upheld the ban, finding that it did not "severely burden [the] party's associational rights." *Id.* at 359. Defendants attempt to dramatically broaden this holding, claiming that *Timmons* stands for the proposition that citizens have no First Amendment right to communicate to voters through the initiative process. To the contrary, the *Timmons* opinion upheld the antifusion law *because* the law only "slightly [limited] the party's ability to send a message to the voters" and because the law still enabled each political party "to use the ballot to communicate information about itself and its candidate to the voters, so long as that candidate [was] not already someone else's candidate." *Id.* at 363. Thus, the Court upheld the fusion ban because it

did not unduly interfere with the political parties' constitutional expression and merely established reasonable electoral procedures.

Defendants also cite *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), in which the Supreme Court stated that "when the state is the speaker, it is entitled to make content-based choices." *Id.* at 833. However, this selective quotation referred to a state educational institution's allocation of scarce resources based on academic priorities. *Id.* The case has no bearing on instances of "state speech" that interferes directly with plaintiff's core political activity and ability to communicate to voters.

Defendants contend that plaintiff has no First Amendment claim when the state as speaker places untruthful and misleading statements on a ballot title. This holds true, according to defendants, even when a "warning" inhibits plaintiff's own core political speech. Taken to its logical extension, such an argument would obliterate plaintiff's First Amendment right to communicate to voters. For example, a state body that opposes a particular politician's candidacy could place patently false language beside the candidate's name on the ballot. Based on defendants' argument, because the state is the "speaker" in this example, it would be immunized from the candidate's First Amendment challenge to the state's inclusion of the label below his or her name.

The First Amendment protects the right of ballot measure petitioners to communicate to voters. *Meyer*, 486 U.S. at 420-21. Plaintiff's attempt to explain the tax consequences of Measure 36-55 to voters is a form of core political speech, and restrictions on such speech are

subject to exacting scrutiny. *Buckley v. American Constitutional Law Found., Inc.*, 525 U.S. 182, 186-87, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999). For the reasons provided in *Horton*, the court finds that the three percent warning misleads voters to grossly overestimate the tax consequences of the ballot measure to which the warning attaches. The inclusion of the three percent warning in the title of Measure 36-55 will inevitably cause voter confusion and inhibit "the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" *Meyer*, 486 U.S. at 420-21.

The "state as speaker" argument does not alter the analysis when the "state speech" infringes on plaintiff's First Amendment rights. The fact that the State of Oregon authored the three percent warning, which defendant Yamhill County adopted, does not change the fact that plaintiff's own core political speech is impaired by the three percent warning. In *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999), the Supreme Court struck down a Colorado law requiring petition circulators to wear badges that read either "VOLUNTEER" or "PAID" because such a restriction interfered with the circulators' ability to communicate to voters, thereby infringing on the circulators' core political speech. *Id.* at 200. The "speech" at issue – badges containing the words "VOLUNTEER" or "PAID" – originated from the State of Colorado. Under defendants' reasoning, because the badges originated from the state, the circulators in *Buckley* would have no First Amendment claim. However, in *Buckley*, the Supreme Court was concerned primarily with the effect the state-mandated words had on the plaintiff's own protected activity. The fact that Colorado was the "speaker" requiring state-generated

words – "VOLUNTEER" and "PAID" – was immaterial to the analysis.

Plaintiff is among the chief petitioners who gathered signatures of registered voters to place Measure 36-55 on the ballot for the March 9, 2004, election. Plaintiff has spoken with hundreds of potential voters about Measure 36-55. Many of these voters support passage of Measure 36-55, but express great concern about the large tax consequences they infer are associated with Measure 36-55 based on the three percent warning. Plaintiff's ability to accurately explain the tax consequences associated with Measure 36-55 to voters is impaired by state-mandated language that is profoundly misleading. By placing the "warning" on the ballot itself – a place where voters are likely to give great weight to the government-authored statement – defendants would eliminate any chance for plaintiff to rebut or clarify the issue to voters.

Unlike *Timmons*, where, despite the antifusion law, the party's ability to communicate to voters was limited only "slightly" and where each political party was still "able to use the ballot to communicate information about itself and its candidate to the voters," plaintiff cannot use the ballot to accurately convey information about Measure 36-55 to voters. *Timmons*, 520 U .S. at 359. By placing the false and misleading three percent warning on the title of Measure 36-55, the State of Oregon has "impede[d] the sponsors' opportunity to disseminate their views to the public." *Meyer*, 486 U.S. at 419. As such, O.R.S. § 280.070(4) is unconstitutional.

For the reasons provided in *Horton*, the court finds that enforcement of O.R.S. § 280.070(4), requiring inclusion of the three percent warning in the title of Measure

36-55, is subject to exacting scrutiny. *Buckley*, 525 U.S. at 192. As in *Horton*, defendants have failed to meet their burden. Accordingly, the court finds that O.R.S. § 280.070(4) is unconstitutional as applied to the title of Measure 36-55.

Further, the statute is unconstitutionally overbroad and is therefore invalid on its face. The overbreadth doctrine is an exception to the normal standards governing facial challenges to state statutes. *See Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798-99, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984). A statute is unconstitutionally overbroad if it infringes on a substantial amount of protected activity "judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973); *see also New York v. Ferber*, 458 U.S. 747, 772, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). Such a finding prohibits all enforcement of the law "until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression." *Broadrick*, 413 U.S. at 613.

The court finds that the three percent warning required by O.R.S. § 280.070(4) is unconstitutionally overbroad. Although O.R.S. § 280.070(4) evinces the legitimate goal of informing voters of the tax consequences of ballot initiatives, the warning is required in the titles of all "measure[s] authorizing the imposition of local option taxes," regardless of whether the measures have any chance of "causing" a property tax increase of more than three percent. O.R.S. § 280.070(4). Plaintiff's speech, as well as the speech of future ballot measure proponents, is chilled when the three percent warning is included in the title of a ballot measure that has no chance of "causing" property taxes to increase more than three percent. Other

circulators are less likely to obtain signatures for future ballot initiatives involving local option taxes and to engage in the political discourse accompanying that activity because they would face the hurdle of convincing voters of the false nature of the state-mandated "warning." Consequently, O.R.S. § 280.070(4) "discourages participation in the petition circulation process. . . ." *Buckley*, 525 U.S. at 200.

In compliance with *Broadrick*'s instructions regarding limiting constructions and partial invalidation, *Horton* invalidated O.R.S. § 280.070(4) only for those ballot measures that cannot by themselves increase property taxes more than three percent. Certainly, other solutions would remedy the constitutional infirmity as well. For example, the warning itself could be altered to explain that the local option tax, which by itself cannot raise property taxes more than three percent, could raise property taxes more than three percent in conjunction with a three percent increase in assessed property value. However, the court declines to rewrite the three percent warning to include such tautology; if the three percent warning is to be rewritten, the task is best left to the legislature. As explained in *Horton*, because O.R.S. § 280.070(4) does not limit the applicability of the three percent warning to only those measures that may "cause property taxes to increase more than three percent," the statute is overbroad and, accordingly, unconstitutional.

C. Due Process

The court adopts the due process analysis expressed in *Horton*, which struck down O.R.S. § 280.070(4), as applied to the challenged measure. The same conclusion is

reached by applying O.R.S. § 280.070(4) to Measure 36-55. The inherently misleading nature of the three percent warning "so upset[s] the evenhandedness of the referendum that it work[s] a patent and fundamental unfairness on the voters." *National Audubon Society, Inc. v. Davis,* 307 F.3d 835, 858 (9th Cir.2002). Defendants contend incorrectly that *Horton* did not address the question of whether the three percent warning "is so misleading that voters cannot recognize the subject of the amendment at issue." State of Oregon's Memorandum in Opposition to Motion for a Preliminary Injunction at 7 (citing *National Audubon Society,* 307 F.3d at 858). Defendants conceded at the January 13, 2004, oral argument, "This is a tough statute to uphold even under that test." In fact, here, as in *Horton,* the court finds that even under the strict reading of *National Audubon Society,* the three percent warning would so mislead voters that they would be unable to decipher the subject of Measure 36-55. As stated, a Yamhill County voter who owns property valued at $150,000 will read the title of Measure 36-55 and believe that his or her property taxes might increase $70 or $4,500, when in fact the tax burden authorized by Measure 36-55 is no more than 45 cents. The voter is misled to believe that the subject matter of Measure 36-55 involves a potentially significant tax increase. The court finds that voters will be unable to recognize the subject of Measure 36-55 because voters will be misled by a three percent warning that overstates the potential tax consequences of Measure 36-55 by a factor of at least 150 and at most 10,000. Accordingly, plaintiff has shown a substantial likelihood of success on the merits on his due process claim.

D. Relief

Plaintiff has met his burden of showing success on the merits and the likelihood of irreparable harm. The court holds as a matter of law that O.R.S. § 280.070(4) is unconstitutional as applied to Measure 36-55 and as promulgated. The irreparable harm of voter confusion and the loss of a fair election caused by the inclusion of the three percent warning in the title of Measure 36-55 cannot be corrected through legal remedies. Accordingly, injunctive relief is proper.

When crafting remedies in cases involving elections, the Supreme Court has stated, "In awarding or withholding immediate relief, a court . . . should act and rely upon general equitable principles." *Reynolds v. Sims*, 377 U.S. 533, 585, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). The court should consider the "timing of relief," and whether the relief would impose "unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree." *Id.*

As noted above, the court finds that by requiring the inclusion of the three percent warning in the titles of ballot measures that have no possibility of "causing" an increase in property taxes of more than three percent, O.R.S. § 280.070(4) is overly broad. Because plaintiff has succeeded on his facial challenge, defendants are permanently enjoined from enforcing that provision for all ballot measures that by themselves cannot cause an increase in property taxes of more than three percent. The State of Oregon is ordered to notify all county clerks of the invalidity of O.R.S. § 280.070(4) in instances where ballot measures cannot by themselves cause property taxes to increase more than three percent.

Given that plaintiff has succeeded on the merits of the applied challenge to O.R.S. § 280.070(4), the inadequacy of legal remedies, and the likelihood of irreparable harm, the court enjoins defendants from including the three percent warning in the voter pamphlet and ballot title of Measure 36-55 under O.R.S. § 280.070(4). The burden placed on defendants by this injunctive relief is slight, given that the ballots for the March 9, 2004, Yamhill County election have not been mailed. The effort required to remove the three percent warning is insignificant as weighed against the extreme voter confusion that would be caused by inclusion of the warning in the title of Measure 36-55.

E. Consolidation

By the parties' stipulation at oral argument, the preliminary injunction hearing is consolidated with the trial on the merits. Fed.R.Civ.P. 65(a)(2); *University of Texas v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981).

The parties are ordered to submit a joint proposed final judgment consistent with this Opinion and Order within 10 days. If the parties are unable to agree on the language of the proposed final judgment, they shall submit their own versions and explain the differences between the proposals.

IT IS SO ORDERED

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JOAN HORTON and
NANCY NEWELL

Plaintiffs,

v.

MULTNOMAH COUNTY,
OREGON and
JOHN KAUFFMAN,

Defendants,

THE STATE OF OREGON
and MARA WOLOSHIN,

Intervenors.

Civil No. 03-1257-HA

OPINION and ORDER

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HAGGERTY, Chief Judge:

Before the court is plaintiffs' Motion for Preliminary Injunction. The court heard oral argument on the Motion today, October 17, 2003. For the following reasons, plaintiffs' Motion for Preliminary Injunction is granted in part.

BACKGROUND

This action involves Multnomah County Ballot Measure 26-52, which appears on the November 4, 2003, ballot. On September 4, 2003, Judge Janice Wilson of the Multnomah County Circuit Court certified the title of Measure 26-52, which states that the Measure would "finance an engineer's report on revenue bonds for acquisition or construction of the utility system and the cost of an election to authorize revenue bonds, if held." The funds for the engineer's report would be generated from a "one-year special levy of $.003 per $1000 assessed" valuation of property. The title certified by Judge Wilson explains that "The levy for a house with assessed value of $150,000 would be about 45 cents." However, the title also states, "This measure may cause property taxes to increase more than three percent." This latter statement ("the three percent warning") is the subject of the current constitutional challenge.

Because Measure 26-52 authorizes a one-year local option tax, it is subject to Oregon law requiring any

measure authorizing the imposition of a local option tax, no matter how small, to include the three percent warning. O.R.S. § 280.070(4). Thus, even if a measure authorizes a tax that will raise property taxes by far less than one percent, the statute mandates that the three percent warning be added to the title.

Plaintiffs correctly contend that the three percent warning is inaccurate in the context of Measure 26-52. For example, the title notes that a house with an assessed value of $150,000 would incur a one-time obligation of an additional 45 cents in taxes. That statement is factually correct. However, the three percent warning leads voters to believe that their property taxes might increase more than three percent if Measure 26-52 passed. For a house valued at $150,000, three percent of the assessed value is $4,500. Read in this manner, the three percent warning overstates the potential effect of Measure 26-52 by a factor of 10,000 (45 cents is one ten-thousandth of $4,500).

The three percent warning also overstates the potential effect of Measure 26-52 if the warning is read to mean that Measure 26-52 may increase an owner's current property taxes by three percent. The average property owner in Multnomah County pays $21 per $1,000 of assessed valuation per year. At that rate, a house valued at $150,000 would pay $3,150 in property taxes annually. A three percent increase of that amount is $94.50. In this example, although Measure 26-52 would cause only an increase in property taxes of 45 cents for a house valued at $150,000, the three percent warning misleads voters to believe that the measure may cause taxes to increase more than $94.50. Under this reading, the three percent warning overestimates the potential burden a taxpayer might incur by more than 200 times of the Measure's potential

impact. Regardless of whether the three percent warning overstates the potential tax consequences of Measure 26-52 by a factor of 200 or 10,000, plaintiffs correctly contend that such language is inherently misleading and hinders the conveyance of accurate information to voters.

STANDARDS

The court may issue a preliminary injunction under the traditional test used by the Ninth Circuit. A preliminary injunction shall be issued if the moving party can demonstrate "either (1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and the balance of hardships tipping in their favor." *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 422 (9th Cir. 1991) (citing *Diamontiney v. Borg*, 918 F.2d 793, 795 (9th Cir.1990)). "These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." *Hunt v. National Broadcasting Co., Inc.*, 872 F.2d 289, 293 (9th Cir. 1989) (quoting *United States v. Odessa Union Warehouse Co-op*, 833 F. 2d 172, 174 (9th Cir. 1987)).

As to the second formulation of the test, "serious questions" are those "questions which cannot be resolved one way or the other at the hearing on the injunction and as to which the court perceives a need to preserve the status quo. . . ." *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988). Serious questions are "substantial, difficult and doubtful" enough to require more considered investigation. *Id.* Such questions need not show a certainty of success, nor even demonstrate a probability of success, but rather "must involve a 'fair

chance of success on the merits.'" *Id.* (quoting *National Wildlife Fed'n v. Coston*, 773 F.2d 1513, 1517 (9th Cir. 1985)).

"There is one additional factor we must weigh. In cases such as the one before us in which a party seeks mandatory preliminary relief . . . courts should be extremely cautious about issuing a preliminary injunction." *Martin v. Int'l Olympic* Comm.,740 F.2d 670, 675 (9th Cir. 1984) (citing *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir.1980)).

DISCUSSION

A. Jurisdiction and Preclusion

A federal district court lacks jurisdiction to review "a state-court judgment in a particular case." *Worldwide Church of God v. McNair*, 805 F.2d 888, 891 (9th Cir. 1986) (citing *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 486 (1983)). Thus, dismissal is required "[i]f the constitutional claims presented to a United States district court are inextricably intertwined with the state court's denial in a judicial proceeding. . . ." *Feldman*, 460 U.S. at 482 n.16.

On October 3, 2003, this court issued an Order finding that it had jurisdiction to consider plaintiffs' constitutional challenges. Subsequent to that ruling, intervenor Woloshin submitted the full transcript of the state court ballot certification hearing before Judge Wilson. After a careful review of the state court hearing, this court finds no reason to deviate from its October 3, 2003, Order and finds that consideration of the constitutional claims here is not

"inextricably intertwined" with the state court ballot title certification.

Judge Wilson "dismiss[ed] the [constitutional] challenges as improperly joined with the ballot title challenge." Transcript of September 2, 2003, hearing at 37. Judge Wilson specifically held, "I'm not dismissing this with prejudice, it is without prejudice." *Id.* at 38. In the course of briefing following the October 3, 2003, Order, defendants stated, "[A]s the record shows, Judge Wilson never reached the [constitutional] question." Defendants' Supplemental Memorandum in Response to Plaintiffs' Motion for Preliminary Injunction at 4 n.2. Accordingly, an evaluation of plaintiffs' constitutional claims cannot be "inextricably intertwined" with the state court's determinations.

As explained below, the findings of this court do not conflict with the state court actions, and plaintiffs are not precluded from bringing the constitutional claims here. Judge Wilson announced that her findings were limited to "a special statutory procedure." Transcript of September 2, 2003, hearing at 36-37. That procedure requires the certifying court to determine whether the proposed ballot measure title is "insufficient, not concise or unfair." O.R.S. § 250.195. In concluding that the language of the title was "poorly drafted" but not "grossly misleading," Judge Wilson performed no more than what the "special statutory procedure" requires of certifying courts. Transcript of September 2, 2003, hearing at 100. This court's function is different; the task before this court is to determine whether inclusion of the three percent warning in the title of Measure 26-52 violates plaintiffs' rights secured under the First and Fourteenth Amendments of the United States Constitution.

B. First Amendment Right to Communicate to Voters

The First Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment, prohibits state governments from making laws that abridge "the right of people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const amend I.

State action that constrains the political expression of the citizenry is subject to "exacting scrutiny." *Buckley v. Valeo*, 424 U.S. 1, 16-17 (1976). Plaintiffs contend that the three percent warning violates their First Amendment right to communicate with voters. In *Buckley v. American Const. Law Found.*, 525 U.S. 182 (1999), the Supreme Court struck down a Colorado statute requiring petition circulators to wear badges that read either "VOLUNTEER" or "PAID." The Court recognized that it must be especially vigilant in protecting "core political speech," and that the First Amendment is "at its zenith" in protecting such speech. *Id.* at 183.

In *Meyer v. Grant*, 486 U.S. 414 (1988), the Supreme Court struck down a state statute banning the payment of petition circulators because the law "necessarily reduce[d] the quality of expression" of political actors. *Id.* at 419 (citing *Buckley*, 424 U.S. at 19).

Defendants argue that the three percent warning is not inaccurate. The Oregon Constitution was amended by voters in 1997 to state, "For tax years beginning after July 1, 1997, the property's maximum assessed value shall not increase by more than three percent from the previous tax year." Oregon Const., Art. XI, § 11(1)(b). However, the three percent limit may be exceeded if taxpayers approve a

local option tax. As discussed above, Measure 26-52 authorizes the imposition of a local option tax of 45 cents for properties valued at $150,000. Conceivably, defendants argue, Multnomah County could raise the assessed valuation of homes by exactly three percent, as permitted by the Oregon Constitution, and the small tax increase authorized by Measure 26-52 would then "raise property taxes more than three percent." This interpretation of the three percent warning is rejected.

As dictated by the cannon of statutory interpretation, the language of ballot measures should be given their plain meaning. *United States v. Ventre*, 338 F.3d 1047 (9th Cir. 2003) (citing *United States v. Gonzales*, 520 U.S. 1 (1997)). The proposed Ballot Measure title states, "*This* measure may *cause* property taxes to increase more than three percent."

O.R.S. § 280.070(4)(a); Multnomah County Ballot Measure 26-52. There is only one reasonable interpretation of this language. A voter deciding how to vote on Measure 26-52 would read the above phrase and be led to believe that Measure 26-52 by itself may "cause property taxes to increase more than three percent." The language of the title plainly implies that the Measure, and the Measure alone, may "cause" the increase. As such, the proposed title misleads voters to believe that Measure 26-52 may cause taxes to increase at a level far beyond the Measure's possible reach.

Like a statute that impairs the political speech of petition circulators, Oregon's law requiring the placement of false language directly within the title of Measure 26-52 "impedes the sponsors' opportunity to disseminate their views to the public." *Meyer*, 486 U.S. at 419 (citing with

approval *Grant v. Meyer*, 828 F.2d 1446, 1453-1454 (10th Cir. 1987)). Plaintiffs are among a group of citizens who gathered nearly 10,000 signatures of registered voters to place Measure 26-52 on the ballot for the November 4, 2003, election. Plaintiffs' ability to accurately explain the tax consequences associated with Measure 26-52 to voters has been severely impaired by state-mandated language that is profoundly misleading.

As the Supreme Court has warned, "[T]he First Amendment requires us to be vigilant in making those judgments, to guard against undue hindrances to political conversations and the exchange of ideas." *Buckley*, 525 U.S. at 192 (citing *Meyer*, 486 U.S. at 421). Because the state-mandated three percent warning interferes with plaintiffs' core political speech, it will survive constitutional scrutiny only if the language is narrowly tailored to serve a compelling government interest. *Buckley*, 525 U.S. at 192. Defendants offer no acceptable justification for presenting the distortive three percent warning in the title of Measure 26-52. The use of the three percent warning in this context does not survive strict scrutiny. Plaintiffs have shown a substantial likelihood of success on the merits because their First Amendment speech rights will be harmed by the inclusion of the three percent warning in the title of Measure 26-52.

C. First Amendment Right to be Free of Coerced Speech

The First Amendment prohibits the government from forcing citizens to subscribe to or to be associated with state-sponsored messages. In *Wooley v. Maynard*, 430 U.S. 705 (1977), the Supreme Court struck down a New Hampshire

law requiring motorists to carry the message "Live Free or Die" on their licence places. The Court found that requirement interfered with citizens' "individual freedom of mind." *Id.* at 714.

Here, the State of Oregon requires the sponsors of Measure 26-52 to include the three percent warning in the ballot measure title. Because of its inaccuracy in this context, the coerced content of the three percent warning interferes with the "individual freedom of mind" of voters to make informed voting decisions without state interference. Likewise, as the sponsors of Measure 26-52, plaintiffs will be associated with the false warning, thereby crediting to them a state-sponsored message to which they do not subscribe. As such, their First Amendment right to be free of coerced government-sponsored speech is violated by the inclusion of the three percent warning in the title of Measure 26-52.

As discussed above, defendants have offered no rational basis for the inclusion of three percent warning in the title of Measure 26-52. Accordingly, plaintiffs have shown a substantial likelihood of success on the merits on their First Amendment claims.

D. Facial Challenge

Although generally disfavoring facial statutory challenges, the Supreme Court requires lower courts to strike down overly broad state restrictions that chill protected political expression. *Broadrick v. Oaklahoma*, 413 U.S. 601, 615-16 (1973). Content-neutral speech regulations are subject to intermediate scrutiny and will be upheld if defendants can show that the restriction: (1) advances an important government interest and (2) does not burden

substantially more speech than necessary to further that interest. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 662 (1994).

In this case, the Oregon legislature has attempted to advance an important government interest through O.R.S. § 280.070(4). The statute was designed to inform voters of the potential tax consequences associated with the passage of local option taxes. However, O.R.S. § 280.070(4) burdens substantially more speech than is necessary to achieve that end. The statute applies to all "measure[s] authorizing the imposition of local option taxes," regardless of whether the measures have any chance of "causing" a property tax increase of more than three percent. O.R.S. § 280.070(4). The speech of ballot measure proponents is severely chilled when the three percent warning is included in the title of a ballot measure that has no chance of "causing" property taxes to increase more than three percent. Because O.R.S. § 280.070(4) does not limit the applicability of the three percent warning to only those measures that may "cause property taxes to increase more than three percent," the statute is overbroad and, accordingly, unconstitutional.

E. Due Process

The Due Process Clause of the Fourteenth Amendment requires fundamental fairness in elections. In the context of reviewing past elections, the Ninth Circuit has adopted a strict standard for evaluating due process challenges to language included in ballot measures: "It must be demonstrated that the State's choice of ballot language so upset the evenhandedness of the referendum that it worked a patent and fundamental unfairness on

the voters." *National Audubon Society, Inc. v. Davis*, 307 F.3d 835, 858 (9th Cir. 2002) (citing *Burton v. State of Georgia*, 953 F.2d 1266, 1279 (11th Cir. 1992)).

Offering an incomplete reading of *National Audubon*, defendants contend that due process is offended only if the ballot language "is so misleading that voters cannot recognize the subject of the amendment at issue." *Id.* However, *National Audubon* followed an Eleventh Circuit decision, *Burton*, 953 F.2d at 1579, which was limited to "the context of a case such as this one" involving an attempt to overturn the results of a previously held election. Here, no election has been held, and no election results need to be overturned. The more fitting test is whether inclusion of the three percent warning in the title of Measure 26-52 "so upset[s] the evenhandedness of the referendum that it work[s] a patent and fundamental unfairness on the voters." *Id.* Voters will suffer such an unfairness because the title of Measure 26-52 contains a "warning" that drastically overstates the potential tax consequence of the Measure.

Even if the constitution required extreme voter confusion, as was required in the particular circumstances presented in *National Audubon*, such a case is presented here where voters will be completely misled by a three percent warning that overstates the potential tax consequences of Measure 26-52 by a factor of at least 200 and at most 10,000. The subject matter of a ballot measure that is described as potentially raising voters' taxes by a factor 200 times greater than its potential effect is obscured to voters who expect the government to refrain from printing misleading language on ballots within inches from the space where they will mark "yes" or "no." Fundamental fairness in elections – a bedrock of our democracy – would

be eroded if the state were allowed to require patently false "warnings" to appear on ballot measure titles. The court finds that plaintiffs have shown a substantial likelihood of success on the merits on their due process claim.

F. Relief

Plaintiffs have met their burden of showing probable success on the merits and the possibility of irreparable harm. The court holds, as a matter of law, that O.R.S. § 280.070(4) is unconstitutional as applied to Measure 26-52 and as promulgated. The irreparable harm of voter confusion and the loss of a fair election caused by the inclusion of the three percent warning in the title of Measure 26-52 cannot be corrected through legal remedies. Accordingly, injunctive relief is proper.

Unlike the recent California recall election, this is not a situation in which plaintiffs seek injunctive relief cancelling a scheduled election. *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914 (9th Cir. 2003). In that case, the Ninth Circuit found that "interference with an election after voting has begun is unprecedented." *Id.* at 919. However, the "interference" the court references in *Southwest Voter Registration Education Project* is defined as the cancellation of an impending election. The plaintiffs in that case sought to enjoin the October 7, 2003, gubernatorial election because of alleged discrepancies in vote calculations caused by punch-card ballots. The court noted:

> [E]normous resources already [have been] invested in reliance on the election's proceeding *on the announced date*. Time and money have been

> spent to prepare voter information pamphlets and sample ballots, mail absentee ballots, and hire and train poll workers. . . . Candidates have . . . calibrated their message to the political and social environment *of the time*. They have raised funds under current campaign contribution laws and expended them *in reliance on the election's taking place on October 7*.

Id. (emphasis added). Unlike the plaintiffs in *Southwest Voter Registration Education Project*, plaintiffs here do not seek to postpone the regularly scheduled election set for November 4, 2003. The time and money spent in preparation of the election will not go to waste because the election will be held on November 4, 2003, as scheduled.

When crafting remedies in cases involving elections, the Supreme Court has stated, "In awarding or withholding immediate relief, a court . . . should act and rely upon general equitable principles." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). The court should consider the "timing of relief," and whether the relief would impose "unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree." *Id.*

The court takes notice of the fact that prior to the 8 a.m. hearing held today, defendants mailed 345,000 ballots to Multnomah County voters. This number constitutes over ninety-nine percent of the ballots for the election. The ballots contain the constitutionally deficient three percent warning. The court also takes note that at a hearing held on October 15, 2003, defendants informed the court that the mailing was not required until Tuesday, October 21, 2003. Given the unusual timing of defendants' actions under these circumstances, voters will begin receiving their ballots on October 18, 2003. However, there are still

opportunities to inform voters of the constitutional infirmity contained in the title of Measure 26-52.

The court finds that by requiring the inclusion of the three percent warning in the titles of ballot measures that have no possibility of "causing" an increase in property taxes of more than three percent, O.R.S. § 280.070(4) is overly broad. Because plaintiffs have succeeded on their facial challenge, defendants are permanently enjoined from enforcing that provision.

Moreover, the court holds that equity requires that the voters of Multnomah County be informed of the misleading nature of the three percent warning contained in the title of Measure 26-52. Accordingly, the following injunctive relief is ordered:

Beginning Sunday, October 19, 2003, through November 4, 2003, defendants shall place notices in the full-run editions of the *Oregonian* newspaper. The size of the notices shall be approximately five column inches. The notices shall run in each of the following sections of the newspaper: the "A" section, metro, business, sports, and living. The start date of the notices as well as their placement shall conform to the publisher's restrictions. If the publisher's restrictions prevent complete compliance with this order, the notices shall comply with this order as fully as is practicable. The notices shall contain the following statement: "By Order of the United States District Court for the District of Oregon, the Multnomah County Elections Division advises voters that the passage of Measure 26-52 by itself cannot cause property taxes to increase more than three percent. This clarifies language printed in the November 4, 2003, ballot that was found to be misleading."

Additionally, defendants shall issue a press release no later than October 21, 2003, which states: "By Order of the United States District Court for the District of Oregon, the Multnomah County Elections Division advises voters that the passage of Measure 26-52 by itself cannot cause property taxes to increase more than three percent. This clarifies language printed in the November 4, 2003, ballot that was found to be misleading."

Finally, no later than October 21, 2003, the homepage for the Multnomah County Elections Division shall include the following statement: "By Order of the United States District Court for the District of Oregon, the Multnomah County Elections Division advises voters that the passage of Measure 26-52 by itself cannot cause property taxes to increase more than three percent. This clarifies language printed in the November 4, 2003, ballot that was found to be misleading."

IT IS SO ORDERED

DATED this 17 day of October, 2003.

/s/ Ancer L. Haggerty
Ancer L. Haggerty
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL CARUSO, Plaintiff-Appellee, STATE OF OREGON, Intervenor-Appellant, v. YAMHILL COUNTY, an Oregon municipal corporation, by and through its County Commissioner, Defendant.	No. 04-35155 D.C. No. CV-03-01731-ALH District of Oregon, Portland ORDER

(Filed Nov. 15, 2005)

Before: HUG, TASHIMA, and CLIFTON, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judge Clifton has voted to deny the petition for rehearing en banc, and Judges Hug and Tashima so recommend.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

Oregon Constitution, Article XI

Section 11. Property tax limitations on assessed value and rate of tax; exceptions.

(1) (a) For the tax year beginning July 1, 1997, each unit of property in this state shall have a maximum assessed value for ad valorem property tax purposes that does not exceed the property's real market value for the tax year beginning July 1, 1995, reduced by 10 percent.

(b) For tax years beginning after July 1, 1997, the property's maximum assessed value shall not increase by more than three percent from the previous tax year.

(c) Notwithstanding paragraph (a) or (b) of this subsection, property shall be valued at the ratio of average maximum assessed value to average real market value of property located in the area in which the property is located that is within the same property class, if on or after July 1, 1995:

(A) The property is new property or new improvements to property;

(B) The property is partitioned or subdivided;

(C) The property is rezoned and used consistently with the rezoning;

(D) The property is first taken into account as omitted property;

(E) The property becomes disqualified from exemption, partial exemption or special assessment; or

(F) A lot line adjustment is made with respect to the property, except that the total assessed

value of all property affected by a lot line adjustment shall not exceed the total maximum assessed value of the affected property under paragraph (a) or (b) of this subsection.

(d) Property shall be valued under paragraph (c) of this subsection only for the first tax year in which the changes described in paragraph (c) of this subsection are taken into account following the effective date of this section. For each tax year thereafter, the limits described in paragraph (b) of this subsection apply.

(e) The Legislative Assembly shall enact laws that establish property classes and areas sufficient to make a determination under paragraph (c) of this subsection.

(f) Each property's assessed value shall not exceed the property's real market value.

(g) There shall not be a reappraisal of the real market value used in the tax year beginning July 1, 1995, for purposes of determining the property's maximum assessed value under paragraph (a) of this subsection.

O.R.S. § 250.195 Procedure for elector dissatisfied with title of county measure.

(1) Any elector dissatisfied with a ballot title filed with the county clerk by the district attorney or the county governing body, may petition the circuit court of the judicial district in which the county is located seeking a different title and stating the reasons the title filed with the court is insufficient, not concise or unfair. The petition shall name as respondent either the district attorney or county governing body, depending on who prepared the ballot title, and must be filed not later than the seventh business day after the title is filed with the county clerk. The court shall review the title and measure to be initiated or referred, hear arguments, if any, and certify to the county clerk a title for the measure which meets the requirements of O.R.S. § 250.035.

(2) An elector filing a petition under this section shall notify the county clerk in writing that the petition has been filed. The notice shall be given not later than 5 p.m. on the next business day following the day the petition is filed.

(3) The review by the circuit court shall be the first and final review, and shall be conducted expeditiously to insure the orderly and timely circulation of the petition or conduct of the election at which the measure is to be submitted to the electors.

O.R.S. § 280.070 Manner of holding elections for local option tax or permanent rate limit; additional statements in ballot title.

(1) An election within a county for the purpose of approving a tax levy or tax rate under O.R.S. § 280.060 shall be called by the county court or board of county commissioners and shall be held on a date specified in O.R.S. § 203.085.

(2) An election within a city for the purpose of approving a tax levy or tax rate under O.R.S. § 280.060 or under section 11(3)(c), Article XI of the Oregon Constitution, shall be called by the governing body of the city and held on a date specified in O.R.S. § 221.230.

(3) An election within a political subdivision other than a county or city for the purpose of approving a tax levy or tax rate under O.R.S. § 280.060 or under section 11(3)(c), Article XI of the Oregon Constitution, shall be called by the governing body of the subdivision and held on a date specified in O.R.S. § 255.345.

(4) (a) The ballot title for a measure authorizing the imposition of local option taxes shall contain the following additional statement:

This measure may cause property taxes to increase more than three percent.

(b) The statements required by this subsection shall not be considered for purposes of the word count limitations under O.R.S. § 250.035.

(c) The statements required by this subsection shall be placed after the question on the ballot title.

(5) As part of the question, the ballot title for a measure authorizing the imposition of local option taxes shall state:

(a) The length in years of the period during which the proposed local option tax will be imposed.

(b) The first fiscal year in which the proposed local option tax will be imposed.

(6) As part of the question, the ballot title for a measure authorizing the establishment of a permanent rate limitation shall contain the following information:

(a) The tax rate per $1,000 of assessed value of the proposed permanent rate limitation.

(b) The first fiscal year in which the proposed permanent rate limitation will be imposed.

(7) The ballot title for a measure authorizing the imposition of local option taxes or a permanent rate limitation shall be in compliance with O.R.S. § 250.036.

YAMHILL COUNTY
ELECTION OF MARCH 9, 2004

BALLOT TITLE MEASURE NO. 36-55

CAPTION:

AUTHORIZES SPECIAL LEVY IF YAMHILL COUNTY PUD IS FORMED

QUESTION:

Shall voters authorize levy of $0.003 per $1,000 of assessed valuation if Yamhill County People's Utility District is formed?

This measure may cause property taxes to increase more than three percent.

SUMMARY:

This measure may be passed only at an election with at least a 50 percent voter turnout.

If the Yamhill County People's Utility District is formed, this measure allows the District board of directors to impose a special levy on property within the district. Funds raised from the levy would be used to pay for an engineer's report and a later election to issue revenue bonds, if held.

This one-time levy will raise about $9,700.00. The levy for a house with an assessed value of $150,000 would be about 45 cents.

The estimated tax cost for this measure is an ESTIMATE ONLY based on the best information available from the county assessor at the time of estimate.